No. 12546

United States
Court of Appeals
For the Ninth Circuit.

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Jack Mau, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

QUITTNER, STUTMAN & SHUTAN,

639 S. Spring St.,
Los Angeles 14, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,

111 West 7th St., Room 817,
Los Angeles 14, Calif.

In the District Court of the United States for the Southern District of California

In Bankruptcy No. 46674-PH

In the Matter of

JACK MAU,

Bankrupt.

DEBTOR'S PETITION

Form No. 1

To the Honorable....., Judge of the District Court of the United States for the Southern District of California.

The Petition of Jack Mau, Residing at No. 624 So. Berendo Street, in the City of Los Angeles, County of Los Angeles, State of California, by occupation a custom tailor (engaged in the business of custom tailoring), respectfully represents:

1. Your petitioner has had his principal place of business at 137 E. 7th Street, Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said act.

JACK C. SCHAPIRO &
DANIEL S. MALAMED,

/s/ DANIEL S. MALAMED,
Attorneys for Petitioner.

/s/ JACK MAU,
Petitioner.

State of California,
County of Los Angeles—ss.

I, Jack Mau, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according

to the best of my knowledge, information, and belief.

/s/ JACK MAU,
Petitioner.

Subscribed and sworn to before me this 12th day of November, 1948.

/s/ ELEANOR B. CURTIS,
Notary Public in and for said County and State. [2*]

[Endorsed]: Filed November 15, 1948.

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND OF GENERAL REFERENCE

At Los Angeles, in said District on November 15, 1948.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

*Page numbering stamped at bottom of page of original Transcript of Record.

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 46,674-PH.

Title of Proceedings: Jack Mau.

Filed: 11-15-48.

Referee: Reuben G. Hunt, Esq., Los Angeles, Calif.

/s/ PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed November 15, 1948. [3]

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 46, 674-PH

In the Matter of
JACK MAU,

Bankrupt.

AMENDED SPECIFICATIONS OF OBJECTION TO DISCHARGE OF BANKRUPT

Comes Now Paul W. Sampsell, the duly elected, qualified and acting Trustee for the Estate of the above named bankrupt, and objects to the discharge of the bankrupt from his debts, and by permission of the Court does file the following amended specifications, namely:

Specification No. 1.

That on or about July 26, 1948, the bankrupt obtained an extension of credit in the sum of $730.92 from Walbrooke Clothes, Inc., of Trenton, New Jersey, by knowingly and fraudulently making, signing and delivering to the said Walbrooke Clothes, Inc., a materially false statement in writing respecting his financial condition in the means and by the manner as hereinafter specifically set forth, namely, that on July 26, 1948, the bankrupt was indebted to Walbrooke Clothes, Inc., for merchandise purchased by him on or about April 22, 1948, amounting to $730.92 which was on July 26, 1948, long past due and unpaid. That said Walbrooke [4]

Clothes, Inc., wrote to the said bankrupt, calling his attention to the fact that said invoice was long past due, and demanded payment thereof by return of mail. That in response thereto the bankrupt upon receipt of said demand, wrote said creditor, Walbrooke Clothes, Inc., informing it in writing that he had the sum of $12,500.00 in escrow which was to be released to him as soon as he could get a Court order and asked for a further extension of credit on the payment of said past due account. That in writing said letter the bankrupt meant to convey to said creditor the impression, thought, belief and idea that he had the sum of $12,500.00 coming to him personally, and that out of said sum of $12,500.00 the bankrupt would pay said indebtedness. That said statement in writing was materially false and known to the bankrupt to be materially false in that in truth and in fact there was no escrow and that there was no one in existence holding $12,500.00, or any comparable sum to be released to the bankrupt under any circumstances whatsoever, nor was there any Court action pending from which the bankrupt could or would receive the sum of $12,500.00 or any comparable sum.

That believing said false statement to be true, and believing that the bankrupt had the sum of $12,500.00 in an escrow available to him, the said bankrupt, and believing that the bankrupt would pay said obligation out of said sum of $12,500.00 which the bankrupt represented to be in escrow, the said creditor, Walbrooke Clothes, Inc., refrained from

pressing payment of said debt and the same never was paid and still remains due, owing and unpaid from said bankrupt to the said Walbrooke Clothes, Inc., and that by reason of the foregoing, the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act, and by reason thereof should be denied his discharge.

Specification No. 2.

That subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy [5] herein, and on or about April 12, 1948, the bankrupt knowingly and fraudulently transferred certain real property consisting of a joint tenancy interest in and to real property located at 906-908 S. Sycamore Street, Los Angeles, California, described as follows:

Lot 34 of Tract 5690 as per map recorded in Book 60, page 76 of Maps in the office of the County Recorder in and for the County of Los Angeles, to his wife, Miriam Mau, with the actual intent on the part of the bankrupt to hinder, delay or defraud his creditors, and that by reason of the foregoing, the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act, and should be denied his discharge.

Specification No. 3.

That subsequent to the first day of the twelve months immediately preceding the filing of the peti-

tion in bankruptcy herein, the bankrupt, Jack Mau, knowingly and fraudulently concealed certain personal property belonging to him consisting of a man's three-stone ring of one (1) carat weight, with the actual intent to hinder, delay or defraud his creditors, and that by reason of the foregoing, the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act.

Wherefore, the trustee prays that the discharge of the bankrupt from his debts in bankruptcy be denied.

/s/ PAUL W. SAMPSELL,
Trustee in Bankruptcy.

CRAIG, WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Trustee.

[Endorsed]: Filed July 8, 1949. [6]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON OPPOSITION TO DISCHARGE

The Trustee having filed specifications of objection to discharge of bankrupt, and the same having been set for hearing before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Los Angeles, California, for April 8, 1949,

at 10:00 A.M. on said date, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin, of counsel, and the bankrupt appearing in person and by his attorney, Daniel S. Malamed, and some testimony having been taken and the matter having been thereafter continued to May 10, 1949, and a stipulation having been entered into on May 11, 1949, for the taking of the deposition of a witness, I. Goldberg, and thereafter the bankrupt having employed Messrs. Quittner, Stutman & Shutan as additional counsel, and motions to strike the specifications of objection to the discharge of bankrupt having been made by them, and amended specifications of objection having been filed by counsel for the trustee, and trial of said opposition to the discharge of [7] the bankrupt having been resumed on September 9, 1949, and briefs having been prepared on behalf of both the trustee and the bankrupt, and the matter having been thoroughly argued by counsel and the Referee being fully advised in the premises, now makes and enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The Referee finds that on or about July 26, 1948, the bankrupt, Jack Mau, was indebted to Walbrooke Clothes, Inc., of Trenton, New Jersey, in the sum of $730.92, which amount was due the said Walbrooke Clothes, Inc., on open account and which

was past due; that Walbrooke Clothes, Inc., had written the bankrupt demanding payment of said obligation, had called the attention of its local representative, Ellis Wishnow, to said delinquent account and was prepared to place said delinquent account in the hands of an attorney or a collection agency or a credit insurance company for pressure for immediate payment thereof.

That on or about July 26, 1948, for the purpose of inducing Walbrooke Clothes, Inc., from refraining from pressing said account for immediate payment or collection, the bankrupt, Jack Mau, first informed Ellis Wishnow, local representative of Walbrooke Clothes, Inc., upon the said Ellis Wishnow making a personal call on said bankrupt in an endeavor to collect said account, that he, the said bankrupt, had coming out of an escrow to him, the said bankrupt, the sum of $12,500.00 in cash which was to be released to him as soon as he could get a court order; that at the time of said conference with the said Ellis Wishnow, the bankrupt prepared in his own handwriting a letter direct to Walbrooke Clothes, Inc., informing it that he had the sum of $12,500.00 in escrow which was to be released to him as soon as he could get a court order, and requested said Walbrooke Clothes, Inc., to be patient with him and give him a further extension of time. [8]

That upon receipt of said statement in writing signed by the bankrupt and delivered to I. Goldberg, Credit Manager for Walbrooke Clothes, Inc.,

at Trenton, New Jersey, the said I. Goldberg, believing said statement to be true, and believing that the bankrupt had the sum of $12,500.00 coming to him out of an escrow out of which would be paid the obligation then and there owning to Walbrooke Clothes, Inc., refrained from placing said account against said bankrupt held by the said Walbrooke Clothes, Inc., for collection, refrained from suing on the same or pressing the same further in any manner whatsoever until it became necessary for the said Walbrooke Clothes, Inc., to file its claim in this bankruptcy proceeding as a result of the bankrupt's ensuing bankruptcy.

That said statement was false and untrue and was known by the bankrupt to be false and untrue in that the bankrupt did not have coming to him the sum of $12,500.00 out of escrow; that no escrow had ever been opened providing for a distribution to the bankrupt of $12,500.00 which would be available to pay the claim of Walbrooke Clothes, Inc., and that at the time of making said statement in writing to Walbrooke Clothes, Inc., the bankrupt did not believe said false and untrue statements to be true.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Conclusions of Law

I.

The Court concludes that the bankrupt has been guilty of one of the acts specified in Section 14-c of the National Bankruptcy Act, and by reason

thereof should be denied his discharge, and that an order should be made accordingly.

Dated at Los Angeles in the Southern District of California, this 4th day of November, 1949.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

Disapproved as to Form Under Local District Rule.

/s/ JACK TENNER,
Attorneys for Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 4, 1949. [9]

[Title of District Court and Cause.]

ORDER DENYING DISCHARGE OF BANKRUPT

Specifications of objection to the discharge of the bankrupt having been filed by Paul W. Sampsell, Trustee in bankruptcy herein, and having duly come on for hearing pursuant to novice commencing April 8, 1948, and having been continued and adjourned a number of times, the bankrupt appearing in person and by his attorneys, Messrs. Quittner, Stutman & Shutan and Daniel S. Malamud, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and the matter having been tried, argued and submitted, and the Referee having made findings of

fact and conclusions of law in favor of the Trustee and against the bankrupt, now on motion of Messrs. Craig, Weller & Laugharn, attorneys for the Trustee, Thomas S. Tobin of counsel, it is

Ordered that Amended Specification No. 1 filed by the Trustee be, and the same hereby is, sustained and the discharge of the bankrupt from his debts in bankruptcy be, and it hereby is, denied. [11]

Done at Los Angeles in the Southern District of California this 8th day of November, 1949.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed November 8, 1949. [12]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER BY JUDGE

To The Hon. Reuben G. Hunt, Referee in Bankruptcy:

The Petition of Jack Mau, Bankrupt herein, respectfully represents:

I.

That amended specifications of objections to the discharge of your Petitioner have been filed by Paul W. Sampsell, Trustee in Bankruptcy herein, and the same came on for hearing before this honorable Court, and the matter has been tried, argued and

submitted, and an Order has been entered denying the discharge of the Bankrupt on the 8th day of November, 1949: to wit:

"Specifications of objection to the discharge of the bankrupt having been filed by Paul W. Sampsell, Trustee in bankruptcy herein, and having duly come on for hearing pursuant to notice commencing April 8, 1948, and having been continued and adjourned a number of times, the bankrupt appearing in person and by his attorneys, Messrs. Quittner, Stutman & Shutan and Daniel S. Malamud, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, attorneys for the Trustee, Thomas S. [13] Tobin of counsel, it is

Ordered that Amended Specification No. 1 filed by the Trustee be, and the same hereby is, sustained and the discharge of the bankrupt from his debts in bankruptcy be, and it hereby is, denied."

II.

That the said Order denying the discharge of your Petitioner is erroneous for the following reasons:

(a) That the said Amended Specifications heretofore filed by the attorneys for the Trustee do not contain allegations sufficient to deny your Petitioner's discharge within the meaning of Section 14(c)3 of the National Bankruptcy Act in that the letter which your Petitioner sent to Walbrooke Clothes, Inc., is not a materially false statement in writing respecting your Petitioner's financial

condition and further that your Petitioner did not obtain an extension or renewal of credit within the meaning of Section 14 (c)3 of the Bankruptcy Act;

(b) That this Court granted the request of counsel for the Trustee, allowing him to retake a deposition after a motion to suppress the same had been sustained; that the said authority to the counsel for the Trustee was given over the objection of your petitioner's counsel and that this Court was without the authority to permit or to allow the attorney for the Trustee to retake said deposition;

(c) That the said evidence, introduced in the form of a deposition, should therefore be stricken from the record, and any inferences and conclusions drawn from the same should be disregarded;

(d) That this Court erroneously permitted the introduction of evidence in the form of a deposition over objections made by your Petitioner's counsel in the following particulars: [14]

(1) That Interrogatories 10, 11, 12, 14 and 15 were improper questions in that there was a lack of proper foundation and identification of the document referred to, and for the further reason that the use of secondary evidence in this particular was not permissible;

(2) That Interrogatory 16 called for hearsay without the introduction of the letters alleged to have been written to your Petitioner and as to what your Petitioner gave to Mr. Wishnow and the content of your Petitioner's reply and, further, as to

the information Mr. Wishnow gave Mr. Goldberg;

(3) That Interrogatory 17 called for hearsay without the introduction of the letter allegedly written to Mr. Wishnow and, further, what Mr. Wishnow advised Mr. Goldberg;

(4) That Interrogatories 18 and 19 called for conclusions from documents not properly identified and introduced;

(5) That Interrogatory 20 called for self-serving declarations and was based on document not properly identified and introduced;

(6) That Interrogatory 21 refers to Interrogatory 16, and the said answer to Interrogatory 16 called for hearsay without the introduction of letters allegedly written to your Petitioner and as to what your Petitioner advised Mr. Wishnow and the contents of Mr. Wishnow's reply and what Mr. Wishnow told Mr. Goldberg;

(7) That Interrogatory 22 called for hearsay;

(8) That Interrogatory 24 called for self-serving declarations and were based on letters not properly introduced or identified;

(e) That the Order is not supported by, and is contrary to the evidence in that the evidence did not sustain the burden of proof, to wit: that the statement allegedly made by the bankrupt was known to be false, made with a knowledge of its falsity and was intended to deceive and which, in fact, did deceive; that the evidence presented before

this Court indicated the following explanation for the utilization of the phrase, "12,500.00 in escrow":

Mr. Mau testified that he had been indebted to the Bank of America in the sum of $7,500.00, which represented the first and second mortgage on his home, and that he was further indebted to the said Bank of America in the sum of $4,000.00 on an unsecured promissory note; that he had made arrangements with Mr. Bean, the Vice-President of the Bank of America at the main office located in Los Angeles, whereby Mr. Mau and his wife were to execute a new first mortgage which would secure the indebtedness to the bank on the heretofore executed first and second mortgage, together with providing the bank with additional security on the unsecured promissory note in the sum of $4,000.00; that the proposed mortgage would be in the sum of $12,500.00; that there would be $1,000.00 remaining for the bankrupt which he intended to use to pay this debt to Walbrooke Clothes, Inc.

Mr. Mau had been having matrimonial difficulties with his wife who refused to cooperate with this venture, and consequently the proposed escrow failed. That there was a pattern of matrimonial difficulties is apparent from the contents of the Exhibits submitted to the Court.

(f) That the foregoing evidence fails to support the fraudulent intent of your Petitioner within the meaning of Section 14(c)3 of the Bankruptcy Act.

(g) That the said Order is contrary to law and contrary to the evidence heretofore submitted in

support of the amended specifications in that the letter written by your petitioner is not a materially false statement in writing respecting your petitioner's financial condition within the meaning of Section 14(c)3 of the Bankruptcy Act, and further that your petitioner [16] did not obtain an extension or renewal of credit from Walbrooke Clothes, Inc., within the meaning of Section 14(c)3 of the Bankruptcy Act.

Wherefore, your Petitioner prays for a review of the said Order by the Judge and that the said Order be vacated and set aside.

/s/ JACK MAU,
Bankrupt, Petitioner.

QUITTNER, STUTMAN & SHUTAN,

By /s/ JACK TENNER,
Attorneys for Petitioner. [17]

State of California,
County of Los Angeles—ss.

Jack Mau, being by me first duly sworn, deposes and says: that he is the Petitioner in the above entitled action; that he has read the foregoing Petition for Review of Referee's Order by Judge and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or

belief, and as to those matters that he believes it to be true.

/s/ JACK MAU.

Subscribed and sworn to before me this 16th day of November, 1949.

[Seal] /s/ JACK STUTMAN,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 17, 1949. [18]

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON REVIEW OF ORDER DENYING THE BANKRUPT A DISCHARGE

To the Honorable Peirson M. Hall, Judge of the Above-Entitled Court:

The undersigned Referee in Bankruptcy presents to the Court his certificate on review of his order entered herein on November 8, 1949, denying the bankrupt a discharge.

Craig, Weller & Laugharn, Attorneys for Trustee.

Quittner, Stutman & Shutan and Daniel S. Malamud, Attorneys for Bankrupt.

I.

Statement of the Case

On February 25, 1949, the Trustee in Bankruptcy filed herein specifications of objection to the discharge of the bankrupt. On May 10, 1949, a hearing was had upon [20] said specifications. Evidence was received at such hearing. On June 29, 1949, the bankrupt filed herein his notice of motion and motion to strike such specifications. On July 8, 1949, with the permission of the Referee, the Trustee filed herein amended specifications of objection to the discharge of the bankrupt. On July 14, 1949, the bankrupt filed herein his notice of motion and motion to strike such amended specifications. On July 19, 1949, the deposition of Isidor Goldberg with reference to the opposition to the discharge was filed. On August 3, 1949, the bankrupt filed herein his motion for suppression of such deposition. Thereafter, and on September 9, 1949, a hearing was had upon such amended specifications and the said motions to strike and suppress the deposition. Evidence was received. The case was then submitted to the Referee for decision.

The Trustee presented to the Referee his proposed findings of fact and conclusions of law, pursuant to General Rule 7a of this court. On October 31, 1949, the bankrupt filed herein his objections to such proposed findings. On November 4, 1949, the Referee signed and filed herein his findings of fact and conclusions of law; and on November 8, 1949, signed

and filed herein his order denying a discharge to the bankrupt. On November 17, 1949, the bankrupt filed herein his petition for review of the said order by the Judge. On December 5, 1949, the reporter's transcript of the hearing on September 9 was filed herein. On December 28, 1949, the reporter's transcript of the proceedings on May 10, 1949, was filed herein.

II.

Statement of the Evidence

The reporter's transcripts of May 10 and [21] September 9, 1949, cover the proceedings on those dates and include the evidence taken, except the exhibits which are transmitted herewith. The facts are practically not in dispute. In brief, they are as follows:

The bankrupt was engaged in the business of custom tailoring in Los Angeles. On or about July 26, 1948, he was indebted to Walbrooke Clothes, Inc., a corporation, of Trenton, New Jersey, upon a general claim for goods sold on credit on or about April 22, 1948, in the sum of $730.92. Shortly after July 26, 1948, he received a letter from such creditor, calling his attention to the fact that the bill was overdue and had not been paid. Soon after the receipt of such letter, the bankrupt wrote Mr. Isidor Goldberg, the credit manager of such creditor, on the back of said letter, as follows:

Mr. Goldberg

Dear Sir

I just got back today and saw Mr. Wisnow. I have been home 3 weeks with a nervous breakdown, lost 43 lbs.

My case as Mr. Wisnow nows was pospond for 3 weeks more. There is $12,500 in Escrow to be released to me as soon as we get the court order.

Please be patient with me and I will streghten everthig with you so I can resume bussines in the fall so both of us can prosper. Things while I was gone where very bad.

Hoping to get a favorable reply to this Mr. Wollcott knows me for years and I am sure my reputain has been of the best This trouble will all be settled in a few weeks Thanging you in advance

I remain

Respfuly yours,

JACK MAU. [22]

Mr. Ellis Wishnow was the creditor's sales representative in Los Angeles. The creditor had sent at least two letters to the bankrupt advising him that his account was overdue and that the creditor would be compelled to turn the account over for collection and suit if it was not paid. The bankrupt not only wrote Mr. Goldberg that he had this money in escrow but also told the same thing to Mr. Wishnow. Mr. Wishnow then advised Mr. Goldberg that the bankrupt had his money tied up in escrow but

that the creditor would be paid and not to press the bankrupt for money.

If the creditor had not been told directly by the bankrupt by this written statement that he had this $12,500.00 in escrow to be released to him as soon as he could get a court order, it would not have granted any further time to the bankrupt for the payment of the account and would have turned the account over to the London Guaranty and Accident Company, with whom it held its credit insurance and which handled the creditor's collections, and that company would then have turned the same over to its attorneys for their attention. The creditor, in not taking action to collect the debt and in extending the credit further, relied upon the said written statement of the bankrupt and upon his oral representations to Mr. Wishnow to the same effect. The bankrupt admitted that he knew the statement to the creditor about the escrow was false but that he did not intend to mislead or deceive or defraud the creditor with such statement. He further testified that the real fact was that there was not any escrow at that time, but that it was contemplated at one time that an escrow would be opened and completed with respect to the sale of some property in which he was interested, out of which he would ultimately receive $1,000.00, but that such [23] escrow was never created and the deal collapsed.

The motion to suppress the deposition was heard at the hearing on September 9, 1949. The principal

contention of the bankrupt with respect thereto was that the notary's certificate did not comply with Federal Rule 30f, in that the notary did not certify that the deposition was a true record of the testimony given by the witness. This matter was considered at the hearing on September 9, 1949. The Referee stated that if the trustee thought that the deposition was defective in any respect, he could take the deposition over again. This was objected to by the bankrupt upon the ground that if the deposition were suppressed, it could not be taken over again. Later on at the hearing, the bankrupt, through his counsel, stipulated that the deposition need not be taken over again and could be received in evidence, subject to his objection that it was insufficient in that it did not contain such a certification. In his petition for review, the bankrupt alleged that the motion to suppress the deposition was sustained. This is incorrect. The Referee made no order with respect to such motion, particularly since the bankrupt's counsel suffered it to be received in evidence, subject to his said objection thereto.

III.

Questions Presented

1. Was this false statement of the bankrupt regarding the escrow, knowingly and fraudulently made by the bankrupt with intent to deceive and relied upon by the creditor in extending credit?

2. Did the Refere have the power, if the motion

to suppress the deposition were granted, to permit the testimony [24] of Goldberg to be taken again by deposition?

3. Were the rulings by the Referee erroneous with reference to the admittance into evidence of the testimony alleged by the bankrupt to be hearsay?

4. Was the testimony given in the deposition of Goldberg, the credit manager of the creditor, with respect to the reliance by the creditor, in extending credit to the bankrupt, upon the written statement of the bankrupt that he had $12,500.00 coming to him out of an escrow, self-serving and therefore inadmissible?

5. Where did the burden of proof lie after the Trustee had shown to the satisfaction of the Court that the bankrupt had committed an act condemned by Section 14a(2) of the Bankruptcy Act?

IV.

Comment on the Law

1. Section 14c(3) of the Bankruptcy Act provides that the Court may deny a discharge if the bankrupt ". . . obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; . . .". Such a statement must have been made knowingly and fraudulently, with intent to deceive; must have been material

relative to the bankrupt's assets and liabilities; and must have been relied upon by the creditor in order to constitute a sufficient ground of denying the discharge. In our case, the contention made by the bankrupt is that while the written statement he made to the creditor regarding the $12,500.00 in escrow was false and the facts were otherwise, he did not make such statement with intent to defraud the creditor. Intent to [25] deceive, on the part of the bankrupt, not being susceptible of direct proof, will be regarded as established by reasonable and necessary inference from the facts of the case. The burden of showing, by a preponderance of evidence, countervailing or explanatory facts and circumstances sufficient to contravene the inference of intent to deceive, clearly rests upon the bankrupt. To permit bankrupts who admit the commission of acts forbidden by Section 14 of the Bankruptcy Act, to shield themselves from the penalties imposed, by merely interposing their own assertions of honest motives and innocent intent, uncorroborated by additional evidence, clear and convincing in character, would result in affording an easy method of frustrating the purposes of the law. One who, by his own admission, swore to a statement which he knew to be materially false would naturally be suspected of having the same slight regard for truth when the occasion demands of him a plausible explanation. In re Monsch, E. D., Ky., 34 ABR (NS) 116, 18 F. Supp. 913. See, also, in re Rosenfield, W. D., N. Y., 22 ABR (NS) 161,

1 F. Supp. 924; Yates v. Boteler, CCA 9, 163 F.(2) 953. The making of the statement mentioned in the statute means to recklessly make it, with no honest belief that it is true. In re Weitzman, N. D., Tex., 6 ABR (NE) 427. Whether or not a bankrupt fraudulently intended to falsify his financial statements in any particular for the purpose of obtaining credit is largely a question of fact. Baash-Ross v. Stephens, CCA 9, 27 ABR (NS) 591, 73 F.(2) 902. The fact that a false financial statement was made carelessly and with no bad intent and that the bankrupt, at the time of making the statement, believed that he would be able to repay his creditors, does not operate to prevent the statement from [26] barring his discharge. In re Easthan, S. D., Tex., 18 ABR (NS) 217, 51 F.(2) 287.

It thus appears, from the facts in this case and the cited cases, that the bankrupt committed the offense described in Section 14a(3) of the Bankruptcy Act and is, therefore, not entitled to a discharge.

2. The Referee knows of no rule, law or decision at least where it does not appear that anyone would be prejudiced or that a vested interest would be injured, to order a suppressed deposition taken over again to cure any defects therein. No showing was made here by the bankrupt that the retaking of the deposition would prejudice him in any way.

3. Even if the so-called "hearsay" testimony was erroneously admitted into evidence, such error

is harmless and non-prejudicial since the bankrupt himself, by his own testimony, corroborated such so-called "hearsay" testimony. Error, to be taken advantage of, must be prejudicial to the complaining party. An appellant may assign as error only such proceedings as injuriously affect him. Allen v. Bay Cities, 122 C. A. 590, 10 P.(2) 520; Bank v. Cohen, 21 C. A. (2) 510, 69 P.(2) 875.

4. Even though the testimony given by Goldberg in the deposition to the effect that the creditor relied upon the bankrupt's written statement respecting the escrow be, in a sense, self-serving, one of the necessary elements in establishing the commission by the bankrupt of the act prohibited by Section 14a(3) of the Bankruptcy Act is such reliance, and testimony of the creditor with respect thereto is competent. In re Boomgaarden, D. C., Minn., 9 ABR (NS) 233, 17 F.(2) 149; In re Lundberg, CCA 7, 48 ABR 41, 272 F. 107. Furthermore, the testimony given by Goldberg, the credit [27] manager of Walbrooke Clothes, Inc., to the effect that such creditor relied on the false statement in extending credit, is corroborated by the fact that thereafter the creditor refrained from suing upon the account. Under these circumstances, the admission into evidence of the statement of Goldberg in the deposition, that the creditor, his principal, relied upon the statement of the bankrupt about the $12,500.00, does not constitute prejudicial error on which the bankrupt may rely upon review. McCurtain v. Guthrie, 294 P. 133, 146 Okla. 144; Johnson

v. Tunstall, (Tex.), 25 S. W. (2) 828, rev'g. 13 S. W. (2) 240. At all events it would seem that such testimony would be prima facie evidence of reliance, and the burden would be on the bankrupt to show that the creditor did not rely upon the bankrupt's statement when it did forbear to sue the bankrupt to collect the unpaid account.

5. In presenting the evidence above summarized, the Trustee showed to the satisfaction of the Referee that there were reasonable grounds for believing that the bankrupt had committed one of the acts which would have prevented his discharge in bankruptcy under Section 14c(3) of the Bankruptcy Act. In Section 14c(7) of the Bankruptcy Act, it is provided that, where this situation appears, the burden of proving that he has not committed any such acts shall be upon the bankrupt.

V.

Findings of Fact and Conclusions of Law

The Referee's findings of fact and conclusions of law were filed herein, as above indicated, on November 4, 1949. [28]

VI.

Documents Accompanying This Certificate

The documents relative to the order of the Referee made on November 8, 1949, and which accompany this certificate, are as follows:

1. The documents referred to above under "Statement of the Case."

2. The one exhibit introduced into evidence.

3. Briefs filed by counsel with the Referee, specifically as follows:

a. Brief of Trustee, filed September 17, 1949.

b. Reply brief of bankrupt, filed October 7, 1949.

c. Trustee's memorandum on opposition to discharge, filed October 19, 1949.

Dated: This 6th day of January, 1950.

Respectfully submitted,
/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed January 6, 1950. [29]

At a stated term, to wit: The February Term, A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the 15th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Cause.]

MINUTE ORDER AFFIRMING REFEREE

This matter having been submitted to the court on Petition for Review of the Referee's Order denying the discharge, the court, being fully advised, orders, that

"The Order of the Referee is affirmed." [30]

In the District Court of the United States Southern District of California Central Division

In Bankruptcy No. 46,674-PH

In the Matter of
JACK MAU,

Bankrupt.

ORDER AFFIRMING REFEREE'S ORDER

The petition for review of the order of Referee Reuben G. Hunt denying a discharge to the bank-

rupt herein, coming on for argument on January 23, 1950, the bankrupt and petitioner on review appearing by his attorneys, Quittner, Stutman & Shutan, Jack Tenner of counsel, and the Trustee appearing by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and the review having been argued and submitted, and the Court having considered the same and having entered its Minute Order on February 15, 1950, now on motion of Messrs. Craig, Weller & Laugharn, attorneys for the Trustee, it is

Ordered that the findings of fact and conclusions of law of the Referee be, and they hereby are, adopted by the Court, and the order denying the bankrupt's discharge is affirmed.

Done at Los Angeles in the Southern District of California this 2nd day of March, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to Form Under Rule.

/s/ JACK TENNER,
Attorneys for Bankrupt.

[Endorsed]: Filed and entered March 2, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Paul W. Sampsell, Trustee in Bankruptcy Herein, and His Attorneys, Craig, Weller & Laugharn:

Notice Is Hereby Given that Jack Mau, Bankrupt herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that Minute Order entered February 15, 1950, in Book Number 75, Page 261, wherein Honorable Peirson M. Hall, Judge of the above-entitled Court, affirmed the Order of Honorable Reuben G. Hunt, Referee in Bankruptcy, denying the discharge of the Bankrupt herein.

Dated: This 13th day of March, 1950.

QUITTNER, STUTMAN & SHUTAN,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 13, 1950. [32]

[Title of District Court and Cause.]

CORRECTED NOTICE OF APPEAL

To Paul W. Sampsell, Trustee in Bankruptcy Herein, and To His Attorneys, Craig, Weller & Laugharn:

Notice Is Hereby Given that Jack Mau, Bankrupt herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that Minute Order entered February 15, 1950, in Book Number 75, Page 261, wherein Honorable Peirson M. Hall, Judge of the above-entitled Court, affirmed the Order of Honorable Reuben G. Hunt, Referee in Bankruptcy, denying the discharge of the Bankrupt herein; and, further,

Notice Is Hereby Given that Jack Mau, Bankrupt herein, appeals to the United States Court of Appeals for the Ninth Circuit from that Order entered March 2, 1950, in Book Number 64, Page 713, signed by Honorable Peirson M. Hall, judge of the above-entitled Court, affirming Referee's Order Denying Discharge.

Dated: This 28th day of March, 1950.

QUITTNER, STUTMAN & SHUTAN,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 3, 1950. [34]

Los Angeles, California, Tuesday, May 10, 1949, 10:00 A.M.

The Referee: How about the Jack Mau matter?

Mr. Tobin: I want to put on just a little testimony in the Mau matter.

The Referee: All right. Go ahead.

Mr. Tobin: Mr. Wishnow.

ELLIS WISHNOW

called as a witness, being first duly sworn, testified as follows:

The Referee: State your name.

The Witness: Ellis Wishnow.

Examination

By Mr. Tobin:

Q. Mr. Wishnow, where do you live?

A. 4446 West 64th Street.

Q. What is your occupation?

A. Traveling salesman.

Q. Are you the local representative of Wallbrook Clothes, Inc.? A. Yes.

Q. You are their local representative?

A. Yes.

Q. Do you know the bankrupt, Jack Mau?

A. Yes, I do.

Q. How long have you known him? [2*]

A. I have known Jack Mau, I would say, 13 or 14 years.

Q. Prior to July 26, 1948, was he indebted to your company?

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Ellis Wishnow.)

A. I believe at one time he was indebted to us. I am not positive, but he bought goods from us prior to that time, and that is why he was indebted to us.

Q. Showing you a letter dated July 26, 1948, directed to Jack Mau of Hollywood, and signed Wallbrook Clothes, Inc., by I. Goldberg, Credit Manager, I will ask you if that letter will refresh your recollection as to the amount Mau owed you at that time? A. Yes, it does.

Q. And was that the amount, so far as you know?

A. So far as I know, that is the amount.

Q. Had you called on Mau for payment of that indebtedness at any time prior to that date?

A. I don't believe so, prior to the date of that letter.

Q. When, if at any time, did you call on him for payment of that obligation?

A. I called on Jack Mau approximately three days after that letter was written, receiving a copy of the same.

Q. You had received a copy of it from your headquarters? A. That's right. [3]

Q. And at the time you called on Mr. Mau about three days after the date of this letter, did you have a conversation with him? A. Yes, I did.

Q. Where did that conversation take place?

A. In the store.

Q. Who was present?

A. Jack Mau, and I believe the tailor and salesman.

(Testimony of Ellis Wishnow.)

Q. And yourself? A. Yes.

Q. Will you give the Court the substance of the conversation that took place between you and Jack Mau?

A. I asked Jack when he expected to make the payment, and he told me at the time that he was sick for quite a while, and it cost a lot of money, and that he had $12,500, I believe, in escrow, and he expected it out within two or three weeks, and when it came through he would pay us our money.

Q. Did you make the suggestion to him that he write those facts to your headquarters?

A. Yes, I told him to explain it to them, so they would know that.

Q. Showing you the back of this letter of July 26th, directed to Jack Mau of Hollywood, signed Wallbrook Clothes, Inc., and calling your attention particularly to the handwriting on the back, are you familiar with Jack Mau's [4] handwriting?

A. No, I am not.

Q. Do you know his signature?

A. No, I don't.

Q. You wouldn't know it? A. No.

Q. In any event, did you make recommendations of any kind to your company with regard to not pressing Mau for the time being in connection with this?

A. I told them Jack would probably pay it, because he told me he would.

The Referee: May I see that, please?

(Testimony of Ellis Wishnow.)

Mr. Tobin: Yes, your Honor. I would like to offer it in evidence, if the Court please, as Trustee's Exhibit 1.

Mr. Malamed: I think I will object to it at this time, because at this time it hasn't been tied together with the bankrupt. There is no proof of his signature. I don't know that it is proper at this time. I think when the bankrupt is on the stand they will be able to ask the bankrupt and get it in in that way.

The Referee: Did you prepare the schedules?

Mr. Malamed: Yes, your Honor.

The Referee: And he signed them?

Mr. Malamed: Yes, sir.

The Referee: Do you contend that this signature is not his signature? [5]

Mr. Malamed: I wouldn't contend that it is not his signature. I said I don't know.

The Referee: What is your point? Have you seen this?

Mr. Malamed: I don't want to make it difficult here.

Mr. Tobin: I will ask to have it marked as Trustee's Exhibit 1 for identification, and then, as Trustee's Exhibit No. 2, for the purpose of laying a foundation for the introduction of Exhibit 1 for identification, I would like to offer in evidence page 4 of the transcript of the examination of the bankrupt, which occurred in this court on February 2, 1949, at 2 p.m., in response to questions asked by Mr. Samuel Miller in regard to that same letter.

(Testimony of Ellis Wishnow.)

Mr. Malamed: If your Honor please, I will withdraw my objection to the letter being introduced in evidence.

The Referee: Have you seen this?

Mr. Malamed: I saw the transcript.

The Referee: Have you read this? Show it to him.

(Mr. Tobin handed transcript to the witness.)

Mr. Malamed: I withdraw my objection, your Honor.

The Referee: I am going to overrule the objection, if you want to put it in evidence.

Mr. Tobin: I will, yes.

The Referee: The Court has the power, under the law and the decisions, to compare a signature with previous signatures of the same party in the same proceeding, and I [6] have just looked over Jack Mau's signatures to his schedules in this bankruptcy, and his statement of affairs, and the Court rules that it is Jack Mau's signature. Furthermore, his evidence identifies this particular letter, so I will overrule the objection and receive it in evidence.

EXHIBIT NO. 1

Mr. Goldberg

Dear Sir

I just got back today and saw Mr. Wisnow. I have been home 3 weeks with a nervous breakdown, lost 43 lbs.

(Testimony of Ellis Wishnow.)

My case as Mr. Wisnow nows was pospond for 3 weeks more. There is $12,500 in Escrow to be released to me as soon as we get the court order.

Please be patient with me and I will stregthen everythig with you so I can resume bussines in the fall so both of us can prosper. Things while I was gone were very bad.

Hoping to get a favorable reply to this Mr. Wollcott knows me for years and I am sure my reputain has been of the best. This trouble will all be settled in a few weeks. Thanging you in advance

I remain

Respfuly yours,

JACK MAU.

Q. (By Mr. Tobin): Did you believe, at the time you made your recommendations to the company, that Jack Mau had $12,500 coming from an escrow?

A. At the time of this letter——

Q. (By Mr. Tobin): Did you believe that he was telling the truth?

A. Yes, I believed he was telling the truth.

Q. If you had known that the statements contained in Trustee's Exhibit No. 1 were not true, would you have recommended to your company that they give him further time?

A. No, I wouldn't.

Q. How long prior to the date of Exhibit No. 1, that is, July 26th, approximately how long had your

(Testimony of Ellis Wishnow.)

company been pressing Jack Mau for payment of this obligation?

A. According to the letter, the letter was dated July 26th, and the terms of the bill was net 60 days, and they claimed they were 30 days past due on July 26th, so it was probably the first time we put any pressure on at all.

The Referee: Mr. Tobin, what specification is that?

Mr. Tobin: Specification No. 4.

The Referee: I see. False statement in writing?

Mr. Tobin: Yes, your Honor.

The Referee: All right.

Q. (By Mr. Tobin): I believe you testified that you recommended that he be given more time?

A. Yes, I believe I did.

Mr. Tobin: That is all.

The Referee: You believe you testified, or did you say that?

A. At the time Mr. Mau told me he had this money coming, I wrote my company and told them about it, and, in response to that, I believe they gave him more time.

Mr. Samuel Miller: May I be excused, your Honor?

The Referee: Yes.

(Testimony of Ellis Wishnow.)

Examination

By Mr. Malamed:

Q. You say you have known Mr. Mau for a very long period of time?

A. That's right.

Q. And you represented other companies, too?

A. The same firm.

Q. A number of years? A. Yes.

Q. You had been doing business with him, for that firm, for all these years?

A. No. Jack worked for someone else before he had that place, and I knew him there. [8]

Q. How long had he had this place, do you know?

A. I am not sure, but I imagine that was 1944 or 1945.

Q. A number of years? A. Yes.

Q. And during that time had he been purchasing from your company through you?

A. I believe we sold Mr. Mau one or two bills before that time, I would say about six to nine months before this came up.

Q. Now, before you received a copy of this letter in the mail, you hadn't been asked to press him for any payment of seven hundred and some odd dollars due the company?

A. I don't believe so. I don't believe I had been.

Q. But this was actually the first contact that was made for collection of this past due debt?

A. As far as I can remember.

(Testimony of Ellis Wishnow.)

Q. Isn't it a fact that you came to talk to Mr. Mau after you received that letter, and you explained to him or told him that you knew about his circumstances, you knew that he had been losing money at that time, did you not?

A. I knew that Mr. Mau was sick. I could see that he had lost 30 or 40 pounds, and he told me it had cost him a lot of money.

Q. Isn't it a fact that you told Mr. Mau that you weren't worried about him from a credit standpoint, that you [9] felt that he mould pay this bill?

A. Yes, that's right.

Q. Did you also suggest to him that he write something to the credit manager to indicate his good faith, not to ignore this letter, but to let him know something was going to be done?

A. That's right.

Q. Did you also suggest to him that he try to send some money within the next couple of weeks?

A. Yes.

Q. Did you discuss anything further with Mr. Mau as to what he might possibly write in a letter?

A. I told him to write to them the things he told me.

Q. Did he at that time tell you anything about the $12,500?

A. First he told me he had money in escrow.

Q. Did he tell you how much money?

A. I am not sure of the exact amount; I wouldn't say.

(Testimony of Ellis Wishnow.)

Q. Did he tell you what kind of an escrow?

A. I believe it was a house, but I am not sure.

Q. In other words, he was supposed to get some money from his house?

A. I believe so. I am not sure whether the money was from a house, but there was money involved.

The Referee: In escrow?

The Witness: And when that came through he would send the money.

Q. (By Mr. Malamed): In the case of a bad debt, do you have anything to do with the collection of it?

A. No. Sometimes I suggest that I call on the account and see what I can do. It is usually handled from the Credit Department.

Q. In this particular case did you have any specific instructions as to what you were to do?

A. No.

Q. When you received a copy of this letter of July 26th, was there any other communication sent to you?

A. Not that I can recall.

Q. So it was just the first warning, so to speak, and, as a result, you went to see the debtor, and you had no instructions as to any further proceedings?

A. That's right.

Q. What if the man had told you, "I don't intend to pay," or "I can't pay"?

A. I would tell the company, and it was up to them.

Q. You would report back whatever the conversation was?

(Testimony of Ellis Wishnow.)

A. I would report back, yes.

Q. Would it be up to you to make a recommendation to the company as to what proceedings to take?

A. Pardon?

Q. Would it be up to you to make a recommendation to the company?

The Referee: Ask him why he didn't make a recommendation.

Mr. Malamed: There are two things there, if your Honor please, one, that if the man had not told him the story, he would have recommended differently than he did, and, having told him the story, he did what he did.

The Referee: If he said he had no money coming, or something like that, this gentleman would write back and tell them he was against it, but when he said he had $12,500 coming to him, they naturally delayed action, just like you and I would. Don't let me throw you off the track.

Q. (By Mr. Malamed): Was there anything in your conversation with Mr. Mau concerning the money coming out of escrow that you understood to be a created story, for the purpose of giving your credit manager something to keep him quiet for a while?

Mr. Tobin: I object to it as calling for a conclusion of the witness.

The Referee: Well, I think that objection is good. You are entitled to examine on the other examination.

(Testimony of Ellis Wishnow.)

Q. (By Mr. Malamed): Well, did you honestly believe that there was money coming out of an escrow to Mr. Mau?

The Referee: What difference does it make? [12]

Mr. Tobin: I think that would be competent, your Honor, if he believed it to be true, on the question of reliance.

The Referee: Wait a minute. Maybe I am wrong there.

Mr. Tobin: I think that is competent, on the matter of his belief.

Q. (By Mr. Malamed): Did you honestly believe he had this money coming out of the escrow?

A. Yes, I did. He told me so, and I naturally believed him.

Q. When did you see Mr. Mau again, after this letter was written?

The Referee: How long are you going to take, counsel?

Mr. Malamed: Not very long.

The Referee: We will recess for 10 minutes.

(Ten-minute recess.)

The Referee: Proceed. Go ahead, counsel.

Q. (By Mr. Malamed): Mr. Wishnow, you testified that you spoke to Mr. Mau about writing a letter. To your knowledge, was any extension of time granted to Mr. Mau for the payment of the debt, as a result of any conversation he had with you or any letter he wrote?

(Testimony of Ellis Wishnow.)

A. I think on account of a letter he wrote an extension was given him.

Q. Was anything done, either verbally or in writing?

A. I don't believe so. [13]

Q. And you don't know what sort of action would have been taken if he hadn't written any sort of letter? You had no instructions on that?

A. No, not myself, no.

Mr. Malamed: I think that is all.

Examination

By Mr. Tobin:

Q. Do you know what the policy of your company would have been if the debtor didn't pay a bill of that kind?

A. They probably would have given him a little bit more time, and if he didn't pay or show any inclination to pay, usually they would turn it over to the insurance company, that is, the Guaranty Insurance Company.

The Referee: The insurance company guaranteed the account? A. Yes, I believe so.

Mr. Tobin: That is all.

Mr. Malamed: That is all.

Mr. Wishnow: The right of subrogation follows. That is all.

Mr. Tobin: That is all. If your Honor please, counsel wanted a continuance in this matter, and I told him the other day I would consent to it. I

imagine, possibly, in the meantime, however, it might be well to take the deposition of this credit manager, Mr. Goldberg.

The Referee: Yes, because he would be the one to [14] state whether or not the company relied on this and granted an extension, and whether they would have granted it without this statement.

Mr. Tobin: I don't want to subject the bankrupt to unnecessary expense. If counsel wants to stipulate that the deposition may be taken on written interrogatories, I will prepare such interrogatories and submit them to him, and he can submit counter-interrogatories, if he wishes, and we can send them the stipulation, and they may be filled out before any Notary Public.

Mr. Malamed: I think so.

Mr. Tobin: In that case, I will prepare the written interrogatories.

The Referee: How long shall we continue it?

Mr. Tobin: How long do you want, counsel?

The Referee: You would need at least 30 days, wouldn't you?

Mr. Tobin: At least.

Mr. Malamed: Do you want to make it about six weeks?

Mr. Tobin: When can your Honor set it? How about Thursday, June 23rd?

The Referee: That is a busy day.

Mr. Tobin: How about Tuesday, the 21st? How does that sound?

The Referee: Do you think that will give you enough time? [15]

Mr. Tobin: Yes. We will get them out. May we have a photostatic copy, either that, or, if counsel wants to stipulate that we can read in his deposition the contents of Exhibit No. 1, on both sides——

Mr. Malamed: I think you already have that in the record somewhere, counsel, and I so stipulate.

Mr. Tobin: There is no objection on the ground that it is not the best evidence? That is the only thing I have in mind. Otherwise we would have to get photostatic copies of Exhibit No. 1 to be sent back with the deposition.

Mr. Malamed: I will let him present it any way he wishes. If you want to make photostats, all right.

Mr. Tobin: I think probably that is the best way, to have photostats made.

The Referee: Be sure that counsel gets one of the photostats.

Mr. Tobin: Yes, your Honor.

The Referee: Be sure and get that exhibit back to the Court.

Mr. Tobin: Yes, your Honor.

The Referee: All right, then. This matter is continued to June 21st. Do you want it at 10 o'clock or 2 o'clock?

Mr. Tobin: I imagine 10 o'clock, your Honor, because the day lasts longer then.

Mr. Malamed: That is Tuesday?

Mr. Tobin: Yes.

[Endorsed]: Filed Dec. 28, 1949.

In the District Court of the United States for the Southern District of California, Central Division

In Bankruptcy, No. 46,674-PH

In the Matter of
JACK MAU,

Bankrupt.

Before the Honorable Reuben G. Hunt, Referee in Bankruptcy.

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING ON AMENDED OBJECTIONS TO BANKRUPT'S DISCHARGE, ON FRIDAY, SEPTEMBER 9, 1949, AT 10 A.M.

APPEARANCES

For the Trustee:

CRAIG, WELLER & LAUGHARN, By
THOMAS S. TOBIN, Esq.

For the Bankrupt:

QUITTNER, STUTMAN & SHUTAN By
JACK TENNER, Esq., and
FRANCIS F. QUITTNER, Esq.

Friday, September 9, 1949. 10:00 A.M.

The Referee: Go ahead with the Mau matter.

Mr. Quittner: If your Honor please, there has been on file with the Court a motion to suppress the deposition.

The Referee: Is that something new?

Mr. Quittner: No. It has been on file for some time. Mr. Tobin has notice of the motion, and it was set, as per an agreement between counsel, to have been heard at the last time that the matter came up for hearing, and Mr. Weller called on that morning, telling us that Mr. Tobin would be out of town, could we set it, the entire procedure, over until today.

It is my suggestion to the Court, with the Court's permission, of course, that the motion to suppress the deposition be heard before we get into other matters, because I think an adjudication as to whether or not the deposition may, in the first instance, be presented to the Court may be very material and may perhaps save a great deal of time.

The Referee: Wait a moment. I see here on August 3, 1949, a motion to—a notice of motion to suppress deposition. I don't find any grounds stated in the notice in support of the motion. What are they?

Mr. Quittner: There is a notice of motion, and accompanying that is a motion. [2*]

The Referee: Your notice of motion should state upon what grounds it is made.

Mr. Quittner: I did, your Honor——

The Referee: I know, but on the face it doesn't so state. You should state it there.

Mr. Quittner: It is not on the notice of motion. I filed a separate document called a motion, in which I state the grounds.

*** Page numbering appearing at top of page of original Reporter's Transcript.**

The Referee: I know. When you file a notice of motion you also give the grounds on which you proceed. How about that, Mr. Tobin?

Mr. Tobin: That deposition was taken pursuant to stipulation, which was entered into May, 1949, between former counsel for the bankrupt and myself. The stipulation reads: "It is hereby stipulated——"

The Referee: Is that stipulation on file?

Mr. Tobin: It should be.

The Referee: Let us find that. Are you familiar with that?

Mr. Shutan: We have a copy of the stipulation.

The Referee: What is wrong with the stipulation?

Mr. Quittner: Your Honor, I find nothing wrong with the stipulation, except the stipulation does not waive the procedure under the Federal Rules.

The Referee: That isn't my point. Just let me get the stipulation. [3]

Mr. Quittner: I have it here, your Honor. It might save time.

The Referee: Wait until I get the original.

Mr. Tobin: The original stipulation may be attached to the deposition.

The Referee: Have I got the deposition?

Mr. Tobin: It should be here.

The Referee: No, it isn't here. You had better ask the outer office to find it.

Mr. Tobin: We have a copy of it. That was sent back to us.

The Referee: You might step in, Mr. Tobin, and get it. Wait a minute, Mr. Tobin. Here it is. Wait a second. Maybe I am wrong. Here is the deposition. The stipulation should be on file, shouldn't it?

Mr. Quittner: We will stipulate that a copy may be deemed the original, your Honor.

The Referee: Let me see if I can find it. I don't find it here.

Mr. Quittner: If your Honor please, we will stipulate that this copy of the stipulation we have may be deemed as the original, for the purposes of this hearing.

Mr. Tobin: I will accept the stipulation. I have some extra copies of the same thing.

Mr. Quittner: If we could have one, too, in this hearing—— [4]

(Document passed to counsel by Mr. Tobin.)

The Referee: Could I have one that isn't torn?

Mr. Tobin: Yes (handing document to the Referee.)

The Referee: What is the date of it? Do you know?

Mr. Quittner: The 11th day of May, 1949.

The Referee: Well, what is wrong with the stipulation?

Mr. Quittner: If your Honor please, we find there is nothing wrong with it, except that the stipulation does not, by its terms, waive Rule 30-F and Rule 31-B and 32-D.

The Referee: What rules are those?

Mr. Quittner: Rule 30-F(1); Rule 31-B——

The Referee: Now, take one at a time. 31-F(1): (Reading) "The officer shall certify upon the deposition that the witness was duly sworn by him——"

Does the deposition state that or not?

Mr. Quittner: It does not, your Honor.

Mr. Tobin: Well, let's see.

Mr. Quittner: Yes. I beg your pardon. It does.

The Referee: (Reading) "I. Goldberg, being first duly sworn by the Notary Public——"

What is wrong with that?

Mr. Quittner: Nothing wrong with that part, your Honor.

The Referee: Then it was certified that the witness was sworn. [5]

Mr. Quittner: There is no statement that the deposition is a true record of the testimony given by the witness, which is a requirement under that section, which provides that it must state on the face of the deposition that this was done.

The Referee: You mean there is no notarization?

Mr. Quittner: There is a notarization on the end, merely saying, "Subscribed and sworn to before me——" But Rule 30-F(1) states that the officer shall certify upon the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

The Referee: How about that, Mr. Tobin?

Mr. Quittner: There is a further rule on written interrogatories, if your Honor please——

The Referee: What rule is that?

Mr. Tobin: I think it is 32.

Mr. Quittner: If I may call your Honor's attention to 31, which is the rule for written interrogatories, I think that is the one you meant.

Mr. Tobin: Yes.

The Referee: Wait a moment. I am listening to Mr. Tobin now. Rule 32: "Effect of Errors and Irregularities in Depositions. (a) As to Notice. All errors and irregularities in the notice for taking depositions are waived, unless written objection is promptly served upon the party [6] giving the notice."

We don't care about that.

Subdivision (c): "As to taking out deposition."

Now, then, will you refer, Mr. Tobin, to Rule 32, Subdivision (d)? I will read that: "As to completion and return of deposition." I think that would cover it.

"Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained."

Now, then this deposition was filed July 19, 1949. Today it is September 9th. Wait a moment. When did you file your motion? You filed you motion to suppress on August 3, 1949. What about that, Mr. Tobin?

Mr. Tobin: I don't think there is any irregularity there. In the first place, there was a stipulation to take this deposition upon the written interrogatories. Written interrogatories were sent back, and the answers were filled in before a notary public and sworn to. And the deposition is O.K.

The Referee: Well, now, wait a moment. What is that Rule you spoke of, Mr. Tenner? [7]

Mr. Tenner: 31, your Honor. That is the rule for the "Depositions of Witnesses Upon Written Interrogatories."

The Referee: But the rule you called my attention to was 30-F(1), isn't it?

Mr. Tenner: Yes, 30-F(1), but 30-F(1) is under a section which deals with depositions upon oral examination. However, Rule 31(b), which deals with the written interrogatories, incorporates Rule 30(c) (e) and (f), which is the only reason I am now using——

The Referee: Now, wait a moment. Where does 31-B incorporate Rule (c) and (f)—I mean 30(b) incorporate Rules——

Mr. Tenner: 30(f). 31(b) does that, your Honor.

The Referee: 31(b) does that?

Mr. Tobin: Yes, sir.

The Referee: What about that, Mr. Tobin. Have you examined these rules?

The Referee: 31(b) says: "A copy of the notice and copies of all interrogatories shall be delivered by the party taking the deposition to the

officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c) (e) and (f)."

We are concerned with (f): "To take the testimony of the witness in response to the interrogatories and to prepare, certify, file, or mail, attaching thereto a copy [8] of the notice and the interrogatories received by him."

Mr. Tobin: There was no notice, if your Honor please; there was a stipulation.

The Referee: But I mean Rule 30(f) requires a certain certification that doesn't appear on here.

Mr. Tobin: "Subscribed and sworn to before me——"

The Referee: That is no certification, beyond this: It says on the certificate this, that the witness was duly sworn by him. Well, I guess the "Subscribed and sworn to" is enough.

"That the deposition is a true record of the testimony given by the witness." Where is that?

Mr. Tobin: Well, if the witness writes the answers in——

The Referee: That wouldn't do. The officer has to certify.

Mr. Tobin: Well, I think this last paragraph of the stipulation, alone, would constitute a waiver.

The Referee: Wait until I get that, the stipulation.

Mr. Tobin: The last two paragraphs: "Said interrogatories, cross-interrogatories, redirect interrogatories, and recross-interrogatories to be sub-

mitted by counsel proposing them to opposing counsel prior to their being forwarded for answer."

The Referee: Wait a moment. I don't read it the way you do. [9]

Mr. Tobin: I said next to the last paragraph. "Said interrogatories, cross-interrogatories, redirect interrogatories, and recross-interrogatories to be submitted by counsel proposing them to opposing counsel prior to their being forwarded for answer."

The Referee: That doesn't cover it. I am talking about the certification by the officer, "That the deposition is a true record of the testimony given by the witness."

Mr. Tobin: They also stipulated that the deposition "may be read in evidence in connection with the opposition to the bankrupt's discharge——"

The Referee: But it says the officer must certify to it. I am inclined to think the motion will have to be granted, and I will give you time to get another deposition.

Mr. Tobin: I guess that is what we will have to do.

The Referee: All right. The motion is granted. How far will we take this case over to get another deposition?

Mr. Tobin: It will have to be another month.

Mr. Tenner: If your Honor please, I would like as of this time to object to another continuance for the reason——

The Referee: I don't care to hear you. I will not permit technicalities to control. I will give him

a month to do it. We are not going to run this court on pure technicalities.

Let's see, what date would that be? [10]

Mr. Quittner: We may want to waive our motion to suppress and go to trial this afternoon.

The Referee: Do you want to do it now?

Mr. Quittner: Yes. Will the Court give me a moment to think about——

The Referee: I will give you several moments. We will recess for 10 minutes.

(Recess.)

The Referee: Let us go ahead.

Mr. Quittner: For the purpose of saving time, but for the purpose of reserving our question of law here, I am willing to do this: That we will stipulate that the deposition now before the Court is a retaken deposition, which has complied with all the rules concerning certificates, reserving, of course, my right, if this matter should have to go further, on the question of the retaking of the deposition, as the matter has been set for trial and is on trial.

Mr. Tobin: It is stipulated that it was taken pursuant to a signed stipulation by Daniel S. Malamud, with the same terms and conditions as the original stipulation, and that such a stipulation exists.

Mr. Quittner: Yes. We have already stipulated that the stipulation exists.

Mr. Tobin: All right.

Mr. Quittner: Then I think our record is in

shape. [11] We reserve the right to object to individual questions upon the rules of evidence, of course.

The Referee: All right. Isn't there some rule that objections to form will not be entertained by the Court unless they are made during the deposition?

Mr. Quittner: That is right. Our objections will be to the merits upon the usual rules of evidence, irrelevancy, immateriality, secondary evidence, things like that.

Mr. Tobin: I will now read the deposition of I. Goldberg, taken before——

Mr. Quittner: You don't need to incorporate it in the record. You are familiar with it?

The Referee: I will read it.

Mr. Tenner: If your Honor please, I intend to make certain objections. Would your Honor wait until you are through? Would you rather I do it after your Honor has read them?

The Referee: No. We will let Mr. Tobin read the questions and give you an opportunity to object on the merits.

Mr. Tobin: I would like to read the deposition, if I may, read it sitting.

The Referee: Yes. Go ahead.

Mr. Tobin: (Reading)

"DEPOSITION OF I. GOLDBERG

"taken before Ruth D. Budson, a Notary Public in New Jersey, on July 8, 1949. [12]

"State of New Jersey,
County of Mercer—ss.

"I. Goldberg, being first duly sworn by the Notary Public, whose name and jurat are hereinafter appended, pursuant to stipulation, entered into between the Trustee and the Bankrupt, and having been sworn as a witness for the Trustee, testify as follows:

"Direct Examination

"Questions Propounded by Mr. Tobin:

"Interrogatory No. 1: State your name?

"A. Isidor Goldberg.

"Interrogatory No. 2: Where do you live?

"A. 113 Lee Avenue, Trenton, New Jersey.

"Interrogatory No. 3: What is your occupation?

"A. Credit manager of Walbrooke Clothes, Incorporated.

"Interrogatory No. 4: Did you occupy the position of credit manager for Walbrooke Clothes, Incorporated, on July 26, 1948? A. Yes.

"Interrogatory No. 5: How long prior to that date did you occupy that position?

"A. Seven years.

"Interrogatory No. 6: Do you know if your company, Walbrooke Clothes, Inc., had any business transactions with the bankrupt, Jack Mau,

d/b/a Jack Mau of Hollywood, during the year 1948? A. Yes. [13]

"Interrogatory No. 7: Directing your attention to the date of April 22, 1948, did your company, Walbrooke Clothes, Inc., sell Jack Mau any merchandise as of that date on credit? A. Yes.

"Interrogatory No. 8: If so, what was the amount? A. $730.92.

"Interrogatory No. 9: If so, when was payment due on the merchandise?

"A. July 21, 1948.

"Interrogatory No. 10: Calling your attention to a photostatic copy of a letter on the stationery of Walbrooke Clothes, Inc., dated July 26, 1948, directed to Jack Mau of Hollywood and marked as Trustee's Exhibit No. 1, I will ask you to examine the signature on the face of that letter and advise us if that is your signature. A. Yes."

Mr. Quittner: Well, we have to object to that question. It calls for the identification of a signature on a photostatic copy, and it is our contention, under the rules of evidence, that the only way that such a document can be introduced for identification or for any other purpose would be for the identification of the original document, except, under the rules of the California Civil Code of Procedure, where the original document is not in existence.

The Referee: Where is the original document?

Mr. Tobin: It is here in court, turned over to us

to have photostatic copies made. It is in evidence.

The Referee: Compare the signatures.

Mr. Quittner: If your Honor please——

The Referee: Never mind. The Court has a perfect right, under the applicable rules, to determine whether or not the signature is genuine, whose it is, by comparing the signature on one document with some other document filed in the case.

Mr. Tobin: It was the Court's own suggestion that this original was taken and photostated, and the photostats used in connection with the deposition. The Court suggested that, himself (handing document to the Referee.)

The Referee: Where is the photostat?

Mr. Tobin: It is attached to the deposition.

The Referee: Now, this original document was received as Trustee's Exhibit No. 1 on May 10, 1949. Where did the Trustee get this from?

Mr. Tobin: The Court gave it to me and requested me to have it photostated.

The Referee: Where did I get it from?

Mr. Tobin: The Court has practically tried this case. It is practically finished.

The Referee: Who produced this document?

Mr. Tobin: We did.

The Referee: Where did you get it from? [15]

Mr. Tobin: From the bankrupt's records—from Walbrooke Clothes. The answer is written on the back.

The Referee: I see. The back of this document contains a written statement signed by Jack Mau. Is Mr. Mau here?

Mr. Quittner: Yes, your Honor.

The Referee: Come forward, please.

JACK MAU

called as a witness, having been previous duly sworn, upon being recalled, testified further as follows:

The Referee: You have been sworn, I think, in this matter?

The Witness: Yes.

The Referee: Will you please look at—just sit down, Mr. Mau. Will you please look at Trustee's Exhibit No. 1, filed here May 10, 1949, and look on the back of that and tell me whether the writing there is your handwriting?

The Witness: Yes, it is.

The Referee: And is the signature yours?

The Witness: That is right.

The Referee: Now, comparing that with the photostatic copy, I see that the face of the photostat —no. Comparing the face of this exhibit, which is a letter to Mr. Mau, signed by Walbrooke Clothes, Inc.—what is this man's name? [16]

Mr. Tobin: Goldberg.

The Referee: I. Goldberg, Credit Manager. That signature is the same as the signature on the photostat. So, the objection is overruled.

Mr. Quittner: May I have the record show, your Honor, that there was no identification before this Court by Mr. Goldberg of his signature. If your Honor please, we are not saying that that is not

(Testimony of Jack Mau.)

Mr. Goldberg's signature, but there has been no identification of Mr. Goldberg's signature.

The Referee: Do you mean to contend now that this photostatic copy doesn't show it is a correct copy of Trustee's Exhibit No. 1?

Mr. Quittner: It may be, your Honor, but——

The Referee: Just answer it: Is it or is it not?

Mr. Quittner: Yes, sir, it is a copy, but the copy has never been properly introduced into evidence, because Mr. Goldberg——

The Referee: I can't help that. The point is that a photostatic copy was introduced. We have here a supplemental photostatic copy of the original document itself. It is immaterial whether it was introduced in the taking of the deposition, on the hearing here. It is quite evidence to the Court that the photostatic copy is a correct copy of the original.

Now, proceed. That is all, Mr. Mau.

(Witness excused.) [17]

Mr. Tobin: The question was objected to——

The Referee: What question was that?

Mr. Tobin: No. 10 (Reading): "Calling your attention to a photostatic copy of a letter on the stationery of Walbrooke Clothes, Inc., dated July 26, 1948, directed to Jack Mau of Hollywood and marked as Trustee's Exhibit No. 1, I will ask you to examine the signature on the face of that letter and advise us if that is your signature.

"A. Yes.

"Interrogatory No. 11: Was that letter (Trus-

tee's Exhibit No. 1) caused to be sent by you to the bankrupt, Jack Mau, in the usual course of business? A. Yes."

Mr. Quittner: May the record show before the answer that we make exactly the same objection as to the identification of the original letter.

The Referee: Now, wait a moment. You said: "Was that letter (Trustee's Exhibit No. 1) caused to be sent by you to the bankrupt, Jack Mau, in the usual course of business?"

You deny that it was sent in the usual course of business?

Mr. Quittner: I am not in a position to deny what Mr. Goldberg did with the letter, but our objection, if the Court is going to overrule it, was that Mr. Goldberg must identify the original letter that subsequently proved to be—— [18]

The Referee: That is just——

Mr. Quittner: If I may, I will quote from cases——

The Referee: Let us get down to the facts. That is super-technical. No court will consider that. That is argument.

Mr. Tobin: The original is in evidence. That is Exhibit 1. That is, we had the photostatic copy made to be sent back for the purpose of the deposition. The Court had already received that in evidence.

The Referee: I know that.

Mr. Tobin: The Court stands on it.

The Referee: The answer of the witness is, "I

sent this letter, Trustee's Exhibit No. 1, in the usual course of business." All right. Proceed.

Mr. Tobin (Reading):

"Interrogatory No. 12: Was a carbon copy of that letter sent to your Los Angeles representative, Ellis Wishnow? A. Yes."

Mr. Quittner: May the record show that we make the same objection to this question?

The Referee: What objection?

Mr. Quittner: The same thing, that the carbon copy of the letter is not proper evidence, that there is still no proper identification before this Court of the original letter. [19]

The Referee: That is ridiculous. Overruled.

Mr. Tobin: Just for the purposes——

The Referee: Wait a moment. The only thing the question asked for is whether a carbon copy of this letter, Trustee's Exhibit No. 1, which is in evidence here and which is exemplified by the photostatic copy, which is a correct copy, shown to the witness in the taking of the deposition was a carbon copy of that letter sent to the Los Angeles representative, and the answer is, "Yes."

That will stand.

Mr. Quittner: What about materiality?

The Referee: Do you want to make an objection on the ground that this is not material?

Mr. Quittner: Yes. The sending of a carbon copy would be hearsay, too, if your Honor please.

The Referee: He knows whether a carbon copy is sent.

Mr. Quittner: Wouldn't it be immaterial?

The Referee: No, no. Go ahead.

Mr. Tobin (Reading):

"Interrogatory No. 13: Calling your attention to a signature, photostated, written out in handwriting, on the back of Trustee's Exhibit No. 1, starting with 'Mr. Goldberg——' "

The Referee: Wait a moment. That is the one I called Mr. Mau's attention to?

Mr. Tobin: Yes.

The Court: Go ahead. [20]

Mr. Tobin (Reading): " 'Mr. Goldberg. Dear Sir,' and signed 'I remain respectfully yours, Jack Mau,' I will ask you to state whether or not you received that handwritten letter in reply to your letter of July 26, 1948 (Trustee's Exhibit No. 1)?

"A. Yes.

"Interrogatory No. 14: If your answer to the foregoing question is yes, will you please have the Notary Public attach these two photostatic copies to your deposition with the letter of July 26, 1948, marked Trustee's Exhibit No. 1, and the handwritten reply marked as Trustee's Exhibit No. 2 for identification, and have them transmitted back to the Court with this deposition? A. Yes."

Mr. Quittner: If your Honor please, we interpose the same objection heretofore made as to the use of Trustee's No. 1 and Trustee's No. 2 on the ground that they are photostatic copies and the originals have never been introduced.

The Referee: He didn't have the originals for use at that time.

Mr. Quittner: He could have gotten the originals. They had the originals.

The Referee: Just a moment. I am talking to Mr. Tobin now.

Mr. Tobin: We tried to call Wishnow on the stand and Goldberg, and the question arose as to whether or not [21] the company had acted on the strength of that letter, and the Court adjourned the matter for the taking of the deposition of the person by whom the credit was extended—or the extension of time granted. And the Court had me take that, as attorney for the Trustee, take that Exhibit No. 1 and have it photostated.

The Referee: What Court did that?

Mr. Tobin: Your Honor.

The Referee: I wasn't here on July 26, 1948.

Mr. Tobin: Oh, no. It was at the trial before that.

The Referee: I wasn't here in July.

Mr. Tobin: Yes, your Honor, your Honor was.

The Referee: I wasn't here in July then.

Mr. Tobin: No. This was in 1949.

The Referee: This is July 26, 1948.

Mr. Tobin: But it was offered in evidence here in court before your Honor.

Mr. Quittner: On the trial.

The Referee: When did you get this letter, this original?

Mr. Tobin: When did I get it?

The Referee: From the bankrupt?

Mr. Tobin: We got that from Walbrooke Clothes.

The Referee: When did you get that?

Mr. Tobin: Before the specifications of objections were prepared. [22]

The Referee: Did you get this before—you must have gotten this before the deposition was taken.

Mr. Tobin: Oh, yes. It was offered in evidence here.

The Referee: And how long before that did you get it from the bankrupt?

Mr. Tobin: We didn't get it from the bankrupt.

The Referee: That is right. You got it from Walbrooke Clothes.

Mr. Tenner: I understood Mr. Tobin before to say that he got this from the books of the bankrupt. If he got the original document from the books of the creditor, we renew our objection.

Mr. Tobin: On what basis?

Mr. Tenner: That couldn't be used for the purposes of identification at the time of the taking of the deposition.

The Referee: The objection is overruled.

Mr. Quittner: In the trial here all we had was a 21 examination. The only thing we have had heretofore was a 21 examination. We never had a trial.

Mr. Tobin: If your Honor will examine the record your Honor will find the specifications of objections were brought on for hearing and practically completed, except for this deposition.

The Referee: That is my recollection.

Mr. Tobin: And your Honor said that we had to have a [23] deposition taken on the question of

whether or not they acted on the strength of that letter. Mr. Malamud stipulated that the deposition could be taken, and then Mau changed attorneys.

The Referee: Go on.

Mr. Quittner: I could answer that if I could check—I would like to check the dates. These things were taken after specifications were filed? I have been——

Mr. Tobin: We tried this case before your Honor on May 10, 1949.

Mr. Quittner: When were the specifications filed?

Mr. Tobin: The amended specifications. The record up there will show it. All I have is an office copy.

Mr. Quittner: I want to correct the record.

Mr. Tobin: The amended specifications were written up on July 7, 1949.

Mr. Quittner: How could we have tried it in May, then?

The Referee: What difference does that make?

Mr. Quittner: I want to correct the record.

The Referee: Do you contend that this letter was never sent by Mr. Goldberg?

Mr. Quittner: We are trying it on the deposition——

The Referee: Just answer my question: Do you contend that this letter was never sent by Mr. Goldberg?

Mr. Quittner: I have no personal knowledge. [24]

The Referee: Do you contend that it was not?

Mr. Quittner: I don't know. I want him to prove it.

The Referee: You don't know anything about it. Now, then, Mr. Mau, come forward.

JACK MAU

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

The Referee: Did you receive this letter from Mr. Goldberg on or about the date it bears, July 26, 1948?

The Witness: I received this letter.

The Referee: About that date?

The Witness: Around that date. It must have been. I don't remember the exact date.

The Referee: But it was about that date or shortly afterwards?

The Witness: Shortly afterwards.

Mr. Tenner: May I ask Mr. Mau if he was familiar with Mr. Goldberg's signature?

The Witness: I don't even know Mr. Goldberg sent it.

The Referee: That is settled. I don't care whether he is or not. Go ahead.

Mr. Tobin: At this time, if your Honor please, I would like to have the writing on the back of that letter marked as Trustee's Exhibit No. 2, and offer it in evidence.

The Referee: Well, I think——

Mr. Tobin: No. 1 is already in evidence. [25]

The Referee: I think that is unnecessary, because Exhibit No. 1 includes the document.

Mr. Tobin: But in this deposition I asked him: "If your answer to the foregoing question is yes, will you please have the Notary Public attach these two photostatic copies to your deposition with the letter of July 26, 1948, marked Trustee's Exhibit No. 1, and the handwritten reply marked as Trustee's Exhibit No. 2 for identification, and have them transmitted back to the Court with this deposition?"

With that being marked Trustee's No. 2 for identification I would like to put it in evidence.

The Referee: I will so consider the whole document, Trustee's Exhibit No. 1, as in evidence, and properly before the Court for consideration.

Mr. Tenner: May I have the record show that we make the same objection; there has been a lack of proper foundation.

The Referee: Your objection is overruled.

Mr. Tenner: I would like to make them for the record's sake, your Honor. I would like to have the record show——

The Referee: All right. The objection is overruled.

Mr. Tenner: Can I give it to the reporter?

The Referee: You have stated it over and over again. Do you want to do it again?

Mr. Tenner: All I want is to add to my objection. We made the additional objection that there has been a lack [26] of proper foundation or identification of Mr. Goldberg's signature.

The Referee: That is overruled.

Mr. Tenner: I just want it in the record.

Mr. Tobin: And the answer is "Yes."

The Referee: Go ahead. The most ridiculous objection I ever heard in any court in this land. Go ahead.

Mr. Tobin (Reading):

"Interrogatory No. 15: Calling your attention to the second paragraph of Trustee's Exhibit No. 2 for identification, reading as follows: 'My case, as Mr. Wishnow knows, was postponed for three weeks more. There is $12,500 in escrow to be released to me as soon as we get the court order.'

"Did you believe from that written statement that the bankrupt, Jack Mau, had $12,500 in escrow to be released to him as soon as he got the court order?

"A. Yes."

Mr. Tenner: May the record show that we make the same objection on the use of the exhibit?

The Referee: Same ruling.

Mr. Tobin (Reading):

"Interrogatory No. 16: Prior to receiving Trustee's Exhibit No. 2 for identification, had you, as credit manager for Walbrooke Clothes, Inc., been pressing the bankrupt, Jack Mau, for payment of his invoice of April 22, 1948, [27] amounting to $730.92?

"A. Yes, we had sent at least two letters to Mr. Mau, advising him that his account was overdue and that we would be compelled to turn this matter over for collection and suit, if it was not paid. Inasmuch as Mr. Mau advised our representative, Mr. Wishnow, that he was having matrimonial difficul-

ties and that he had put in escrow $12,500, and on the strength of Mr. Mau's reply to us, also stating that fact, we withheld suit."

Mr. Tenner: If your Honor please, we make an objection to that answer and move to strike out the answer on the following grounds:

First, that the answer is not responsive to the question, the question being: Did you ever press him for payment?

Second, we make objection to the question that it is hearsay—I mean we make objection to that answer and move to strike the answer; it is hearsay as to the fact that they sent this letter to Mr. Mau, without introducing the letter, and as to whether he advised Mr. Wishnow, and as to the contents of Mr. Mau's reply.

And on the additional ground that it is not responsive to the question, and that the whole thing is hearsay.

The Referee: Take one at a time, now.

Mr. Tobin: You can't take your position piecemeal. Mr. Wishnow testified that he had received word from the [28] home office to press for payment of this obligation, and that he had been trying to collect it, and this is simply connecting up the testimony of Wishnow.

That is the difficulty of a case being tried by two sets of attorneys. Mr. Malamud was the attorney at the beginning of the trial, and when Wishnow was on the stand and Mau was on the stand.

The Referee: Is there any reporter's transcript

of the testimony taken in this matter previously?

Mr. Tobin: It hasn't been written up.

Mr. Quittner: If your Honor please, I don't want to correct Mr. Tobin. Mr. Tobin was not the original attorney here, either. Mr. Early was. I have been in this case since the specifications were filed, and this is the first day of trial on the specifications. I just asked Mr. Mau——

The Referee: You don't know whether it is the first day or not. It is the first day of trial that you participated in.

Mr. Quittner: This is the first day we are coming to trial.

Mr. Tobin: If the Court will go back to May 10th, the Court will see that it was on the calendar.

Mr. Quittner: How could you try it before the specifications were filed?

Mr. Tobin: Because we amended to conform to the proof. [29]

The Referee: Answer that question: How can you try any action before the specifications are filed?

Mr. Tobin: They were filed.

The Referee: How could you try this case before me or somebody else before the specifications were filed?

Mr. Tobin: May I see the Court's file for just a moment? I think I can straighten this out. It is just an attempt to confuse everything. I can straighten it out.

Mr. Quittner: I resent the fact——

The Referee: Sit down. I don't care what you resent. It makes no difference to me.

Mr. Quittner: Mr. Tobin keeps making these remarks.

The Referee: Will you please sit down and behave yourself? I am not interested in what Mr. Tobin says about you or you say about him. I am trying to get the facts and to apply the law properly.

Mr. Quittner has raised a point that I want to know about.

Mr. Tobin: The Court's record shows that on the 25th of January, 1949, an order was entered by this Court extending the time within which to oppose the discharge of the bankrupt, to February 2, 1949.

The record of this Court shows that on February 25, 1949, specifications of objections to the discharge of the bankrupt, signed and verified by Paul W. Sampsell, Trustee, were filed 45 minutes past 9 a.m.

The record also shows that on February 24, 1949, copies of the specifications of objections—no—withdraw that. The record also shows that an order was made by this Court fixing the time and place for hearing the objections to discharge for April 8, 1949, at 10 a.m., signed by Referee Hunt, and the affidavit of mailing was filed March 3, 1949, signed by Reta A. Griffin.

The record also shows a notice of motion, signed by Francis F. Quittner, returnable July 5, 1949, to strike specifications of objections to the discharge of the bankrupt was filed July 29, 1949, and a motion to strike the specifications of objections to dis-

charge was likewise filed.

The record also shows that on July 8, 1949, amended specifications of objections to the discharge of the bankrupt were filed by me.

The record also shows that hearing on the amended specifications was set for the 19th of August, 1949, at 10 a.m.

The Referee: Well, Mr. Tobin, what I want to know——

Mr. Tobin: Well——

The Referee: Wait a moment. What I want to know is this: When was this testimony taken whereof you speak?

Mr. Tobin: My record shows May 10th.

The Referee: And have you——

Mr. Tobin: We went to trial on the original [31] specifications here, and a lot of objections were raised to the form of the specifications, and amended specifications were filed. However, if your Honor wishes, I will put Mr. Mau on the witness stand for 2055 and go over that again.

The Referee: Either that or have the testimony written up, because if there was any testimony taken before we went to trial on the specifications, it would be irrelevant. In other words, you couldn't take any testimony on this matter until after the specifications were filed, whether original or amended.

Mr. Tobin: The original specifications were on file long before this hearing of May 10th.

The Referee: They were?

Mr. Tobin: Yes.

The Referee: Is there any question about that?

Mr. Quittner: Those original specifications were stricken by the Court.

The Referee: No, they weren't stricken. They were allowed to be amended.

Mr. Quittner: Well, the Court struck out three specifications.

The Referee: I know that, but the whole specications were not stricken. We struck out three but left in, as I recall——

Mr. Quittner: Three to be amended.

The Referee: Yes. The whole document was not [32] stricken, though.

Well, Mr. Tobin, either way: You can have the testimony written up, or take it all over again.

Mr. Tobin: I don't know what there is in this estate in the line of funds.

The Referee: I can't help you on that. I don't know, either.

Mr. Tobin: Well, I will suspend reading this deposition and put Mr. Mau on the witness stand.

The Referee: Very well. Mr. Mau, come forward.

JACK MAU

recalled as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

Examination

By Mr. Tobin:

Q. Your name is Jack Mau?

(Testimony of Jack Mau.)

A. Yes, sir.

Q. You are the bankrupt in this proceeding?

A. Yes, sir.

Q. You were in the clothing business?

A. Yes, sir.

Q. In Hollywood? A. No. In L. A.

Q. 137 East Seventh Street?

A. Yes, sir. That is right.

Q. Do you know Walbrooke Clothes, Inc.? [33]

A. I do.

Q. Did you buy any merchandise from them on credit? A. I did.

Q. Amounting to $730.92?

A. That is right.

Q. And on how much time did you buy those clothes?

A. I bought them from Mr. Wishnow, 60 days or longer past the original day they would ship them.

The Referee: Let us identify Mr. Wishnow.

The Witness: Very good friend of mine.

Q. (By Mr. Tobin): What is his occupation?

The Referee: Who does he represent?

The Witness: Walbrooke Clothes.

Q. (By Mr. Tobin): He was their local representative? A. Yes, sir.

Q. You didn't pay any invoice when it was due, did you? A. No, I didn't.

Q. And on or about July 26, 1948, did you receive Trustee's Exhibit No. 1?

Mr. Tenner: Just a minute, Mr. Mau. I will

(Testimony of Jack Mau.)

object to that: Without proper foundation of the person who wrote that letter.

The Referee: The objection is overruled. The question is: Did you receive that letter on or about that date?

The Witness: I think I did. [34]

Q. (By Mr. Tobin): Did you reply to it?

A. Can I explain to the Court?

Q. Did you reply to it?

A. Can I explain how?

Mr. Tenner: Answer the question.

The Witness: Yes.

Q. (By Mr. Tobin): How did you reply?

A. Can I explain now how?

Mr. Tenner: You just answer the question.

The Referee: I will let him tell.

The Witness: This letter was wrote at Mr. Wishnow's bidding.

The Referee: You mean your reply was?

The Witness: Yes, sir.

The Referee: All right.

Q. (By Mr. Tobin): Did you——

The Referee: Wait a moment. Your reply is contained on the back of this exhibit, isn't it?

The Witness: Yes, sir.

The Referee: All right.

The Witness: I possibly didn't word it properly. I left out a few "ands," and "buts," not knowing the technicality of it.

Q. (By Mr. Tobin): Calling your attention to

(Testimony of Jack Mau.)

the second paragraph on the back of Trustee's Exhibit No. 1, reading as follows: [35]

"My case, as Mr. Wishnow knows, was postponed for three weeks more. There is $12,500 in escrow to be released to me as soon as we can get the court order."

Paragraph: "Please be patient with me, and I will——" What are those words there (indicating)?

A. "straighten everything out with you so I can do business with you in the future, so both of us can prosper." I think Mr. Wishnow knew.

Q. Wait a moment.

The Referee: Just confine yourself to the question.

Q. (By Mr. Tobin): Did you have $12,500 in escrow at the time you wrote that? A. No.

Q. Did you have any money in escrow at the time you wrote that? A. No.

Q. And was an escrow to be released to you soon?

A. If it had materialized it would have.

Q. But it didn't exist?

A. No, it hadn't come up yet. That is right.

Q. And you sent that reply back to Walbrooke Clothes, Inc.? A. I did.

Q. Did you ever pay the bill?

A. No, I didn't.

Q. Were you ever sued on it? [36]

A. No.

Q. Did you ever pay any part of it?

(Testimony of Jack Mau.)

A. I didn't.

Q. And there is no part of it paid now?

A. No.

Mr. Tobin: Now, I would like to offer this in evidence, if your Honor please.

The Referee: It is already in evidence.

Mr. Tobin: Pardon me.

Q. (By Mr. Tobin): You knew at the time you put that statement in that letter that there was $12,500 in escrow that would be released to you soon, that that was an untrue statement, did you not?

A. There wasn't $12,500 in escrow at all.

Q. You knew it was an untrue statement?

A. May I say you can call it misquoting——

The Referee: No. Irrespective of how it was done, was that a true or an untrue statement that you had $12,500 in escrow?

A. I did not have $12,500 in escrow.

Q. (By Mr. Tobin): Then it was untrue?

A. That is right.

Q. And you knew it was untrue?

A. That is right, at the time.

Q. You were seeking a further extension of time to pay—— [37]

The Referee: Ask him why he put it in there if it was untrue.

Mr. Tobin: This question is preliminary:

Q. (By Mr. Tobin): You were seeking further time in which to pay, isn't that right?

(Testimony of Jack Mau.)

A. No.

Q. What was your reason for putting that statement in there, that untrue statement, that there was $12,500 in escrow that would be shortly released to you?

A. It is the same as the last explanation, I said that Mr. Wishnow knew what was happening to me. It is right in there on your letter, the second paragraph. It says here: "I just got back today, and I saw Mr. Wishnow. I have been home three weeks with a nervous breakdown," which I can also verify. "My case, as Mr. Wishnow knows, has been postponed for three weeks."

Q. Yes. Go on and read.

A. (Reading): "There is $12,500 to be released to me as soon as we can get a court order." It should have been—there—it should have been, "There will be $12,000 released to me as soon as Mrs. Mau signs her statement." That was the mispronounce—that was the missing thing I put in there.

Q. You have got "$12,500" in that letter?

A. Yes.

Q. You just read it $12,000." [38]

A. It says "$12,500."

Q. Yes. That is what you put in the letter?

A. Yes, that is right.

Q. How did Mr. Wishnow know that your case had been postponed for three weeks?

A. We had been discussing it.

Q. You told him?

(Testimony of Jack Mau.)

A. Yes. Mr. Wishnow happens to be a very good friend of mine.

Q. So you told Mr. Wishnow that your case had been postponed three weeks?

A. We were talking——

The Referee: Just answer the question.

The Witness: No, I didn't tell Mr. Wishnow what was in that letter. I couldn't have told him. We were discussing my case as it should have been.

Q. (By Mr. Tobin): Mr. Mau, you understand English all right? A. I think so.

Q. Did you tell Mr. Wishnow that your case had been postponed three weeks?

A. Yes, I did.

Q. And that was where he got his information from, was you? A. That is right.

Q. And did you tell Mr. Wishnow that there was [39] $12,500 in escrow?

A. I would get out of escrow, that is right.

Q. And that was untrue?

A. It wasn't unrtue if I would have gotten what I was to have gotten.

Q. You said here that there was?

A. Can I answer the question? Maybe this will clear it up, a lot of things. Mr. Wishnow said, "Jack, do me a favor. Write him a letter you can give me one hundred or two hundred or three hundred." He said, "It will look good for me." I wrote this letter. Mr. Wishnow, himself, mailed the letter while he was in front of me. Nothing in

(Testimony of Jack Mau.)

this letter that I meant to convey that I was seeking further credit, because my whole bill, possibly, was not even 30 days past due.

The Referee: Why did you put that statement in?

The Witness: I had just been very sick——

The Referee: Why did you put that in if you knew it was untrue?

The Witness: Well, what I meant to put in, as I say, as I explained to the Court before, I said—what I should have put in, being nervous at the time, "There will be." If I had put in, "There will be," this whole thing would have been nothing.

The Referee: I don't see much difference.

The Witness: "There will be" instead of "There is" [40] is two different things.

The Referee: Why didn't you put in, "There will be"?

The Witness: I can assure the Court I meant "There will be."

The Referee: What you mean don't help us any. What you did is the important thing. A man may mean to do the right thing and go out and kill somebody.

The Witness: It was done very honorable. It wasn't done with any other intention.

The Referee: You are bound by what you did. Go ahead, Mr. Tobin.

Q. (By Mr. Tobin): But you did want further time to pay?

(Testimony of Jack Mau.)

A. There was nothing mentioned of time or anything else.

Q. You didn't want to be sued?

A. There was no mention of suit. There wasn't any mention of suing or anything else. I could have, possibly, sent $50 to stop a suit, which Mr. Wishnow told me——

Mr. Tobin: That is all for this witness.

Examination

By Mr. Tenner:

Q. Mr. Mau, you used a figure here, "$12,500" in escrow. Would you tell the Court what kind of escrow you are talking about and why you said, "$12,500," as distinguished from any other sum of money? A. Yes. I would be glad to. [41]

Mr. Tobin: That will be objected to as an attempt to alter or vary a written instrument.

The Referee: Not necessarily. "There is $12,500 in escrow." He doesn't explain what that escrow is. If there was any escrow he can explain it. He hasn't any——

Mr. Tobin: "To be released to me as soon as I get the court order."

The Referee: Yes.

The Witness: Can I explain that?

Q. (By Mr. Tenner): Just answer the question, if you know, Mr. Mau, what escrow you had in mind, if any, and why you said, $12,500," as distinguished from any other sum of money?

(Testimony of Jack Mau.)

A. The Bank of America, Mr. Dean, was negotiating a loan on the home for $11,500.

Q. Mr. Dean is who?

A. Vice president of the Bank of America.

Q. Which branch? A. Main office.

Q. He was negotiating a loan on what?

A. On my home.

The Referee: To you? A loan to you?

The Witness: As a loan to the bank, to protect the bank.

The Referee: But the loan was to protect the bank on its claim against you? [42]

The Witness: That is right.

The Referee: Go ahead.

The Witness: The Bank of America would have given—taken a first and second mortgage for the loan that I had with the bank. The Bank of America wanted to give us $11,500. I had agreed to do that, and Mrs. Mau had agreed to do that, also.

The Referee: Let me ask you a question.

The Witness: Yes, sir.

The Referee: If that money was to go to the bank why did you say here it would be released to you?

The Witness: Again, I can say, your Honor, that $11,500 was to the bank—I was to have gotten $1,000 from the $11,000 — $1,000 — absolutely, through Mr. Dean.

(Testimony of Jack Mau.)

The Referee: You were to get 1,000 cash and the bank was to get $11,500?

The Witness: Yes.

The Referee: Now, we are clear on that; so you were to get $1,000?

The Witness: $1,000 in cash and $11,500, which I was to get off the note, and the Bank of America was negotiating to take—in fact, they had negotiated with my wife. That is why I happened to say, $12,500."

Q. (By Mr. Tenner): And you had arranged for an escrow with the Bank of America?

A. I had arranged, spoke to Mr. Dean. Mrs. Mau was [43] called in, and she had agreed to sign.

Q. When you say there was $12,500 in escrow, did you mean that was the total sum given that was to go into escrow?

Mr. Tobin: I object. Leading and suggestive.

The Reefere: Yes. I think counsel is right. Overruled.

Mr. Tobin: Read the question.

(Question read.)

The Witness: $11,500 would have went into escrow, and I would have gotten $1,000.

Q. (By Mr. Tenner): What did you intend to do with the $1,000?

A. Do as Mr. Wishnow said, to send one hundred or two hundred and pay it off.

Q. You metnioned that Mr. Wishnow came to

(Testimony of Jack Mau.)

you and he said, "Jack, write something back to Walbrooke"? A. Yes.

Q. Did Mr. Wishnow have any relationship with Walbrooke?

A. He was their representative.

Q. And he knew you were only going to get $1,000 from the bank? A. Yes.

Q. And he asked you to write this letter, and you gave him the letter to be mailed?

A. Mr. Wishnow—I said, "I got a letter from Mr. [44] Goldberg this morning." He said, "Jack, write him back something."

The Refreee: Did Mr. Wishnow ever say what you should write?

The Witness: He was standing at the opposite——

The Referee: Did he ever see, as far as you know, or read what you did write?

The Witness: That I don't think he read it along with me. He said, "Write——"

The Referee: Never mind that. Did he ever see, as far as you know, or read what you did write?

The Witness: I don't think so.

The Referee: When you gave him the letter to mail, was the letter sealed?

The Witness: Yes. He said, "Gee! That is sealed".

The Referee: And he knew you didn't put any money in there?

The Witness: Yes.

(Testimony of Jack Mau.)

The Referee: Had you ever received any communication from Mr. Wishnow in which he said, "If you don't pay, we are going to sue you?"

The Witness: No.

The Refreee: Had you ever been attached?

The Witness: No.

The Referee: Had you ever been threatened with any kind of action that you would? [45]

The Witness: No.

The Referee: Was this letter asking you about the money the first communication you ever got from him?

The Witness: I think so.

The Referee: Did they answer your letter?

The Witness: No, they did not.

The Referee: Did they ever communicate in any way with you since that time?

The Witness: No, they haven't.

The Referee: All right. Go ahead.

Mr. Tenner: Just a moment. We have got no further questions.

Mr. Tobin: That is all.

(Witness excused.)

Mr. Tobin: I will resume reading the deposition.

Mr. Tenner: We have a motion to strike. Will your Honor rule on our motion to strike 16?

Mr. Quittner: Two grounds to strike: One was testimony as to the contents of a written instrument, and, secondly, they were testifying to hearsay.

The Referee: The answer doesn't cover the con-

tents, other than just a general statement. How about that, Mr. Tobin? Then he says, "Yes, we have sent at least two letters." Mr. Goldberg advised him that the account was overdue and that they will be compelled to turn the matter over for collection, if it wasn't paid. Did you ever see [46] those letters?

Mr. Tobin: It is a question of fact.

The Referee: They were turned over to the trustee by the bankrupt?

Mr. Tobin: No, your Honor, as far as we know.

The Referee: Did you ever get copies of those?

Mr. Tobin: No, your Honor.

The Referee: In view of these objections you should have the copies they sent as secondary evidence. You are not required to produce the originals if the bankrupt doesn't turn them over. Does the bankrupt have those in his possession?

Mr. Quittner: All records are in the possession of the Trustee.

The Referee: Then I will give you time to find—to get from this credit manager, who makes this deposition, his copies of the letters sent.

Mr. Tenner: There was the further motion on the ground that it is not—the whole answer isn't responsive to the question, even if they had the letters.

Mr. Quittner: And also the testimony as to what Mr. Wishnow said would be hearsay.

The Referee: What about that?

Mr. Tobin: Well, the bankrupt has just testified

that he told Wishnow that—he absolutely corroborates the answer. [47]

Mr. Quittner: If you will accept our version of what we will stipulate——

Mr. Tobin: No. The bankrupt volunteered—he told you——

Mr. Quittner: That hasn't anything to do with it.

The Referee: Never mind. Don't jabber among yourselves. Address the Court, please.

Mr. Tobin: If your Honor please——

The Referee: Wait a moment, Mr. Tobin. Hasn't Mr. Mau's testimony covered what this witness says in this second sentence of his answer to Interrogatory No. 16?

Mr. Tobin: Yes, your Honor, and I am going to offer that Interrogatory No. 16 over again, now having been connected up by the bankrupt's testimony on the stand here that he told Wishnow about his marital difficulties, so it is outside of the realm of hearsay. I read the question and the answer first, then the objection came in here, and we put the bankrupt on the stand. Now, the bankrupt corroborates it, so I will read it over again, the bankrupt having connected it up.

The Referee: Well, now, let's see. It is in evidence that Mr. Mau advised their representative, Mr. Wishnow, that he was having marital difficulties, that he had put in escrow $12,500.

Mr. Tobin: He just testified here——

The Referee: What this witness says in this [48]

deposition would be hearsay, but that, I think, is overcome by the witness' tesimony to the same effect, and in other words, it is a harmless statement by the person answering this question.

Now, then, he says on the statement of Mr. Mau's reply to us and also stating that fact we would have sued. The letter of Mr. Mau seems to me to corroborate the entire answer given by this witness to Interrogatory No. 16. I think the point of counsel here, notwithstanding, would be good as to whether or not—for Mr. Mau's testimony. I think it fully corroborates that answer, so I will allow it to stand. Proceed with the next one.

Mr. Tobin: (Reading)

"Interrogatory No. 17: Had you given instructions to your local representative, Ellis Wishnow, to present this claim for payment?

"A. Yes, we wrote Mr. Wishnow to see Jack Mau regarding his past due bill, and Mr. Wishnow advised us that he was having matrimonial difficulties and that his money was tied up in escrow, but that we would get paid and not to press him for the money."

Mr. Quittner: I move to strike that out on the ground of hearsay. That letter, allegedly written to Wishnow, gave him instructions, and if those instructions were oral it would be hearsay.

The Referee: I don't think the letter written to Wishnow is material. "Mr. Wishnow advised us he was having matrimonial difficultes and that his money was tied up in escrow, but that we would get

paid and not to press him for the money." What is wrong with that?

Mr. Quittner: What Mr. Wishnow told Mr. Goldberg is hearsay.

The Referee: It isn't hearsay.

Mr. Quittner: How do we know——

The Referee: Don't get so excited and shout around. Calm yourself. He says, "Mr. Wishnow advised us he was having matrimonial difficulties." Nothing hearsay about that. "That his money was tied up in escrow." Nothing hearsay about that.

Mr. Quittner: We have here, your Honor, Mr. Goldberg testifying to what Mr. Wishnow told him, without having our opportunity to examine Mr. Wishnow.

The Referee: You can have him here.

Mr. Quittner: But that——

The Referee: We won't go into that any further. If you want to question Mr. Wishnow, we will give you an opportunity to do so.

Mr. Quittner: The other objection that we have for the sake of the record is that the question says, "had you given instructions to your local representative, Ellis Wishnow," and the answer came that came back is what Wishnow told him, and we object on the ground that it is not responsive [50] to the question.

The Referee: Your objection is overruled. You are at liberty to produce Mr. Wishnow and examine him on just what he told Goldberg or the Walbrooke Clothes or both of them.

Proceed.

Mr. Tobin: (Reading)

"Interrogatory No. 18: Upon the receipt of Trustee's Exhibit No. 2 for identification, did you then refrain from pressing this claim for immediate payment?

"A. Yes."

Mr. Quittner: We make an objection to that question, your Honor, on the ground that the question calls for conclusions from documents not properly identified and, also, calls for a self-serving declaration.

The Referee: Your first objection, "not properly identfied," is overruled.

Now, then, you object to the portion of his answer which refers to "Did you then refrain from pressing this claim for immediate payment?"

Mr. Quittner: Yes, self-serving.

The Referee: What was your objection to that?

Mr. Quittner: Self-serving.

The Referee: Nothing self-serving about it. Did he or didn't he refrain? He says he did refrain. Go ahead, Mr. Tobin. [51]

Mr. Tobin: (Reading)

"Interrogatory No. 19: If you had known that there was not the sum of $12,500 in escrow to be released to Jack Mau as soon as he could get the court order, as set forth in Trustee's Exhibit No. 2 for identification, would you have granted any further time to Jack Mau for the payment of this account?

"A. No."

Mr. Quittner: We move to strike out the answer to Interrogatory No. 19 on two grounds heretofore made to Interrogatory No. 18, namely that it is an improper identification of a document, and, two, it calls for a self-serving declaration, and, three, it is a conclusion that he granted any further time to Jack Mau for the payment of this account. No evidence that he granted any time.

The Referee: When a witness says he did grant —what was your last point there?

Mr. Quittner: That he granted any further time to Jack Mau.

The Referee: What is wrong with that?

Mr. Quittner: He didn't grant any time.

The Referee: How do you mean he didn't grant any time? He didn't sue, did he?

Mr. Quittner: We would like the record to show that that was not granting further time by not suing.

The Referee: What? [52]

Mr. Quittner: We would like the record to show that that was not granting further time by not suing. The mere refraining from pressing a civil action in court is not granting further time.

The Referee: That is something else, again. Let the record so show. Interrogatory No. 20?

Mr. Tobin: (Reading)

"Interrogatory No. 20: If your answer to the foregoing question is no, then please state briefly what you would have done as credit manager for Walbroke Clothes, Inc., in seeking to collect this account?

"A. We would have turned his account over to the London Guaranty & Accident Company, with whom we hold our credit insurance and who was doing our collections for us, who would have turned same over to their attorneys for further attention."

Mr. Quittner: We move to strike out that answer, for the purposes of the record, because it is pure conjecture as to what he would have done.

The Referee: How far a creditor relied on matters presented to him I think is quite material to show what he would have done if what was represented to him was untrue. Go ahead, Mr. Tobin.

Mr. Tobin: (Reading)

"Interrogatory No. 21: Did you receive any advices from your Los Angeles representative, Ellis Wishnow, in [53] connection with holding off or forbearing in pressing collection of this account against the bankrupt at or about the time you received Trustee's Exhibit No. 2 for identification?

"A. Yes, as explained in Interrogatory No. 16."

Mr. Quittner: I would like the record to show that we make the same motion to strike out the answer to this question on the grounds heretofore raised on our motion to strike Interrogatory No. 16, on the ground that the answer is not responsive to the question and on the ground it is also hearsay as to what——

The Referee: Why isn't it responsive?

Mr. Quittner: The question is: "Did you receive any advices from your Los Angeles representative, Ellis Wishnow, and so forth, and the answer

Mr. Quittner: I would like the record to show, before we make our objection to Interrogatory No. 22, that two lines have been X'd out above the answer: "I herewith turn same over for identification," I would like the record to show that upon reading the X'd out phrases the words appear to say that "the same——"

The Referee: Wait a moment. If it is X'd out, it is not part of the deposition. Therefore, what right have I got to consider what is under the X-ing out? [56]

Mr. Quittner: The rule under Section 30-E of the Federal Civil Procedure states that "Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer, with a statement of the reasons given by the witness for making them."

The Referee: All right, now.

Mr. Quittner: Where the answer is X'd out, I think the Court——

The Referee: I don't know about the rule. The fact is that it isn't in the deposition. I have to consider what is left in.

Mr. Quittner: He has to say why he changed the answer.

Mr. Tobin: I am willing to read the X'd out part. (Reading) "The same were turned over to London Guaranty & Accident Co., who I believe have them in their possession."

Then he apparently got it, and he says, "I herewith turn same over for identification." They are

attached to the original document. I did not get copies with my copy of the deposition.

The Referee: Have you seen it?

Mr. Tobin: No.

The Referee: You read it and show it to him, and we will recess until you send for me.

(Recess.)

The Referee: Let us proceed.

Mr. Tobin: If your Honor please, at this time, in [57] connection with that last answer, I would like to offer these other communications in evidence as Trustee's Exhibit No. 3.

Mr. Tenner: If your Honor please, in connection with the opposition to the introduction of Trustee's Exhibit No. 3 into evidence, we make the following objections for the purposes of record:

We might call the Court's attention to the fact that the deposition, in the form it is there, is violative of Rule 30-E, and this entire answer thereto, regardless of whether or not it has now been read into evidence, is defective on the theory that no reference is given in the deposition as to why a change in form and substance was made.

We further make——

The Referee. What change in form and substance?

Mr. Tenner: The scratching of the two lines and the typing of the third line. I don't know what happened, and there is no statement as to why it happened.

The Referee: I don't care why it happened.

Counsel has read it now and it is in evidence. That answers that.

Mr. Tenner: If that statement is in evidence, then I move to strike out the last answer, being contradictory to the scratched out portion—the scratched out portion being contradictory to the answer below that "I turned the same over for identification." [58]

The Referee: What is contradictory there? I don't see what is contradictory there. That objection is overruled.

Mr. Tenner: And we make the further one on the basis that that—and we make the motion to strike and the motion to exclude Trustee's Exhibit No. 3 because there is no original copy of these letters or reports in evidence, and no copies of the written—there are no originals of the reports or letters which we can even compare with the photostats in this case, and, also, of course, they are hearsay.

The Referee: All right—now, wait a moment. We, therefore, will continue the matter to give counsel for the Trustee time to secure the letters sent by Jack Mau, which are attached to this deposition in the form of photostats——

Mr. Tenner: They are letters to make——

The Referee: Now, wait a moment. And you will call upon the bankrupt to produce the letter dated August 19, 1948, and addressed to him by Mr. Goldberg, and we will give counsel for the Trustee time to produce any originals that may exist,

or any evidence that he may want to produce, the Trustee, regarding this——

Mr. Quittner: We would like the record——

The Referee: Wait a moment. Please, now!

Mr. Quittner: I thought you were finished.

The Referee: I have told you gentlemen over and over and over again not to talk when the Court is talking. I can't [59] think. I will hear you fully, but wait until your turn comes.

The Trustee will have time to communicate with Mr. Goldberg and to secure from him, either by deposition or whatever way the Trustee's counsel is advised, the originals of the documents which are attached in the form of photostats in this deposition and apparently is addressed to a man by the name of Ellis by Mr. Goldberg.

We have here before us the original letter, the photostat, which is attached to the deposition, and the original letter written by Mr. Goldberg to Mr. Mau under date of July 26th. Then we have in evidence the photostat of the original—we have in evidence the original of the photostat attached to this deposition wherein Mr.—the photostat thereof wherein Mr. Mau speaks of the escrow, $12,500.

Now, then, we do not have here the original of the form letter—I can't see anything—I can't see any date given here where Mr. Mau wrote to Mr. Goldberg about certain matters. I will read it: "I just got back today and saw Mr. Wishnow——"

Mr. Tobin: That original is in evidence. That is No. 1.

The Referee: No. Wait a moment. No. 1?

Mr. Tobin: Yes, your Honor. The original of that is in evidence. [60]

The Referee: This is that escrow letter?

Mr. Tobin: Yes.

The Referee: Oh, apparently we have here——

Mr. Tobin: Apparently got an extra copy made.

The Referee: That is in evidence all right. That covers all these, doesn't it?

Mr. Tobin: I think so.

The Referee: Now, how much time do you want?

Mr. Tobin: I am not quite through with the deposition yet. I have got two more questions.

The Referee: Yes, I know, but how much time do you want?

Mr. Tobin: It will probably take another 30 days.

The Referee: All right. It will be granted.

Mr. Quittner: May we have the record show that we have asked Mr. Mau about letters that the Court asked him to bring, and he doesn't have them. He has turned all his documents and papers, letters, and so forth, over to the Trustee.

The Referee: Well, the burden is upon Mr. Mau to produce the originals, and if he hasn't them all, he can get copies as secondary evidence.

Go ahead.

Mr. Tobin: (Reading)

"Interrogatory No. 23:——"

The Referee: Wait until I get that. [61]

Mr. Quittner: The record should show no notice to produce by the Trustee, in order to come within the secondary evidence rule.

The Referee: I didn't get that.

Mr. Quittner: The Court knows that in order to introduce secondary evidence, before trial we have to have notice to produce——

The Referee: I am not insisting on that rule.

Mr. Quittner: We do.

The Referee: I will give counsel time to get it.

Mr. Tobin: Now, there is already testimony that he never received any such letters.

The Referee: What letters?

Mr. Tobin: Any letters except that one that is in evidence as Trustee's Exhibit No. 1. He has already shown he never received any of those letters.

The Referee: Anyway, you are going to have that extra time.

Mr. Tobin: (Reading.)

"Interrogatory No. 23: Has the account, amounting to approximately $730.92, owing to you or to your company by the bankrupt, Jack Mau, ever been paid? A. No."

Mr. Quittner: I would like the record to show that we make no motion in objection to that question and no motion to strike. [62]

The Referee: What a relief!

Mr. Tobin: (Reading)

"Interrogatory No. 24: If the answer to the foregoing interrogatory is no, please state what, if anything, motivated you as credit manager for Walbrooke Clothes, Inc., in deferring action in collecting this account?

"A. Because we relied upon the written state-

ments of Mr. Mau in his letter to us and upon his oral representations to our representative, Mr. Wishnow, to the effect that he was involved in a matrimonial dispute and that he had the sum of $12,500 in escrow but which was soon to be released upon court order."

Signed, "I. Goldberg. Subscribed and sworn to before me this 8th day of July, 1949, before Ruth D. Budson, Notary Public in and for said County and State."

Mr. Tenner: I would like the record to show that we make the motion to strike his answer to Interrogatory No. 24, if your Honor please, as it is a self-serving declaration, to-wit: "What, if anything, motivated you—", which is purely speculative and based on——

The Referee: Wait a moment, counsel, have you read the law on that subject?

Mr. Tenner: Yes. I can quote your Honor authorities.

The Referee: The law is that the creditor must rely upon the statement made to him by the debtor regarding his financial condition, to make it subject to a ground for [63] opposing discharge. Why, in view of that, is this answer improper?

Mr. Tenner: I think it is improper for two reasons, your Honor.

The Referee: What is that?

Mr. Tenner: I think it is improper for two reasons, your Honor, and I am prepared to submit to the Court authorities.

The Referee: All right. Submit them right now. I will hear them, and we will see what they say.

Mr. Tenner: Quoting from Corpus Juris Secundum, page 745, a case therein cited—I quote back, referring to Note 813——

The Referee: I don't care what Corpus Juris says. Let us get the cases, themselves. What are they?

Mr. Tenner: I have—there were so many I didn't get them.

The Referee: What volume is that?

Mr. Tenner: It is under "Evidence". I just didn't write that down.

While she is getting that book, I would like to make a statement of my activity here this afternoon, both for the sake of future relationship with the Court and to explain my position. While it would seem that we have taken a position in which we have resorted to every possible technicality, I am not trying to apologize for that. I would like to tell [64] the Court why I have got to finish this job.

It appeared to me, upon a careful reading of this deposition, that one of two things was obviously true: That the person whose deposition was taken was either an attorney or one so well versed with attorneys' language that he picked up all their phraseology; or, that actually I. Goldberg, himself, never filled in these answers.

And the reason I came to that conclusion—I will

tell you why I did this, and I would like the record to show that we just didn't come here today to raise technical objections. I have very seldom in my life run across—perhaps it is a young life—run across a layman who will answer, for example, Question 22: "If such advices or reports were in writing, will you please attach the writing to this deposition and have the Notary Public mark it as Trustee's Exhibit No. 3 for identification?" And the answer: "I herewith turn same over for identification."

This gave me reason to think, and I went to the answer to Interrogatory 24, and the question isn't important, but this is the answer: "Because we relied upon the written statements of Mr. Mau in his letter to us and upon his oral representations to our representative, Mr. Wishnow, to the effect that he was involved in a matrimonial dispute and that he had the sum of $12,500 in escrow but which was soon to be released upon court order."

And the answer to Interrogatory No. 21. I would say [65] that this Court has had more experience than I, but take 999 laymen out of a thousand and ask them Interrogatory No. 21, and I would like to know how many of them would answer, "Yes, as explained in Interrogatory No. 16."

This runs as a pattern——

The Referee: Counsel, would you like to take the deposition over again by oral testimony? I will permit you to do that, if you want to. Maybe that is the solution of this thing. We will let you go

there, either yourself or a qualified representative, and conduct the proceedings in behalf of your client.

Mr. Tenner: I would like to say this, sir——

The Referee: Just please answer me.

Mr. Tenner: I don't think our client has any money to enable us——

The Referee: I don't care whether he has any money or not. Do you want to do that? Yes or no?

Mr. Tenner: I don't think we can, your Honor. But the only reason I am making these statements to your Honor is that I would like your Honor to be familiar with my thought process, and the purpose of this is that I concluded, obviously, that this had not been done by Mr. Goldberg. I never heard of a layman who answers questions——

The Referee: After you have as much experience as Mr. Quittner and I have you will realize that as a young man you are sure of everything but as an older man you are not [66] sure of anything.

Mr. Tenner: Perahps it is unsatisfactory, but I want to make that explanation.

The Referee: You have the privilege of taking this all over again, if you think it doesn't state true facts, and you can have all the time you need.

Now, I have Corpus Juris Secundum. Where is it?

Mr. Tenner: I would like to call your Honor's attention to page 745—No. 813.

The Referee: 32 C.J.S.

Mr. Tenner: Page 745. May I approach the bench?

The Referee: Just a moment. You are reading from Corpus Juris?

Mr. Tenner: Corpus Juris Secundum.

The Referee: Where are you reading from, the top of the page or where?

Mr. Tenner: It is Note 813.

The Referee: There is no Note 813. You take the original book.

Mr. Tenner: This is the rule (handing book to the Referee). This is the general rule.

The Referee: That is at page 745?

Mr. Tenner: Yes, sir.

The Referee: That reads Section 813 on page 745 out of 32 Corpus Juris Secundum: "The general rule is that where a fact to be proved is evidenced by writing, the original [67] writing is the best evidence, and a copy is not admissible."

I think there is no doubt about that.

Mr. Tobin: It doesn't say "photostatic copy."

The Referee: But that is the general rule.

Mr. Quittner: May I call your Honor's attention——

The Referee: Wait a moment. I am talking to Mr. Tobin now. But that is the general rule, anyhow.

Mr. Tobin: Yes.

The Referee: Then it goes on to state here: "Except where, as stated infra Section 837, the absence of the original is accounted for."

Let us see what 837 says. All right, now. What cases do you refer to?

Mr. Tenner: The cases cited for the general proposition under Note 813, and more specifically——

The Referee: Wait a moment. Note what?

Mr. Tenner: The cases under Note 813.

The Referee: You mean Section 813, not Note?

Mr. Tenner: Yes, sir. I beg your pardon. And more specifically, sir——

The Referee: I don't think there is any question about that. We will pass that. That is the law.

Mr. Tenner: May I just refer your Honor's attention to Section 815, which will answer Mr. Tobin's question on photostatic copies: "Although copies are secondary evidence and thus generally inadmissible——" [68]

The Referee: Well, that is probably so, unless they are identified, and Mr. Mau has identified, I think, all the photostatic copies as correct, except, of course, he wouldn't know about this one here where Goldberg apparently addressed something to a man named "Ellis". All the rest of them are either letters by Mr. Goldberg to Mr. Mau, identified by Mr. Mau and—wait—there is a photostat here of a communication from Mr. Mau to Mr. Goldberg, which I think hasn't been identified by Mr. Mau. I would like to get the evidence. If Mr. Mau hasn't got a copy of it, I told Mr. Tobin he could have whatever time is necessary to get the original from Mr. Goldberg.

Mr. Tobin: Might I say that I will put Mr. Mau on the stand now and ask him?

Mr. Quittner: If I may refer to the Court's records, I think Mr. Mau testified that even to the one letter received from Mr. Goldberg, from the so-called Mr. Goldberg, he was not familiar with his signature, and I would like to say——

The Referee: Do you mean to say that he testified he is not familiar with his signature?

Mr. Quittner: With Mr. Goldberg's signature.

The Referee: What?

Mr. Quittner: With Mr. Goldberg's signature.

Mr. Tobin: Mr. Mau, please take the stand.

The Referee: He got the letter. That is immaterial [69] whether he knew the man's signature or not.

Mr. Quittner: As to our objections, your Honor, to the use of these, without explaining why the originals were not used, the law is ample—that I have been able to find—that Rule 43——

The Referee: Let us not go into that. We are getting into a supertechnical area. Let us get down to the facts here.

JACK MAU

recalled, having been previously duly sworn, resumed the stand and testified further as follows:

Examination

By Mr. Tobin:

Q. Mr. Mau, I will show you a letter attached to the deposition of Mr. Goldberg, bearing a stamp "Received September 1, 1948," and written on the

(Testimony of Jack Mau.)

stationery of Jack Mau Clothes of Hollywood, and I will ask you to examine that and tell us if that is written in your handwriting?

A. Yes, it is. Yes, sir. Yes, sir, this is my letter.

The Referee: What is the answer?

Mr. Tobin: "Yes, that is my letter."

Mr. Tenner: We will make the same objection: The original hasn't been used.

The Referee: What difference does that make? He admits he wrote that. What difference does it make? Asnwer [70] me that, sir.

Mr. Quittner: I may be wrong here, sir, but I have always been of the opinion that it doesn't make any difference if you can identify secondary evidence. You must first explain——

The Referee: Your own client says he wrote that letter and that that is his signature. That is enough.

Q. (By Mr. Tobin): Now, you testified here that you received only one letter from Walbrooke Clothes, Inc., and that was Trustee's Exhibit No. 1?

A. I wouldn't know—what do you mean, the first letter that I wrote——

The Referee: You wrote the letter Mr. Tobin refers to?

The Witness: The letter I wrote in back of it?

Mr. Tobin: Yes.

The Referee: No. You asked him what letter he received. Wait until I get it, because I am

(Testimony of Jack Mau.)

certain that Mr. Mau is trying to tell us the facts right now, and let us have him quite sure of what he says. Let us see, where is that letter?

Mr. Tobin: Trustee's Exhibit No. 1.

The Referee: Here it is. Take Exhibit No. 1 and question him about it.

Q. (By Mr. Tobin): You testified earlier this afternoon that the only communication you had received from Walbrooke [71] Clothes was this letter of July 26th, Trustee's Exhibit No. 1?

A. That is right.

Q. Is that right? A. Yes.

Q. And on the back of Trustee's Exhibit No. 1 is your reply to that? A. That is right.

Q. What was this letter that was received by them September 1, 1948, and likewise a reply, too?

A. This is possible: Then when the money didn't materialize that I wrote him that the money didn't come through, and I spoke to Wishnow again, and Mr. Wishnow, through his direction, I wrote him the second letter, which I told him I would possibly send him a series of checks. It is very possible, from July to September, that I hadn't sent him any checks. It is very possible, from July to September, that I hadn't sent him any checks, and usually I would send my money, take a little more time by letter to Mr. Goldberg, and this is possibly the letter I sent to Mr. Goldberg as of July 26th. That I hadn't gotten to see him here—may I read this to the Court?

(Testimony of Jack Mau.)

The Referee: No. I will read it.

The Witness: It is self-explanatory that I wanted him, to send him a series of checks that he would know that I didn't receive the $12,500, and it so states here, that he [72] did know I didn't get the $12,500.

The Referee: Never mind what he did know and didn't know. Just tell us what you did.

The Witness: That is possible that I wrote him the second letter through the direction of Mr. Wishnow when the deal that I expected didn't go through.

The Referee: This was dated when?

The Witness: There is no date on it. The stamp is——

The Referee: Do you remember about when it was?

The Witness: I can't answer truthfully. I don't remember. I won't say.

The Referee: Apparently Mr. Goldberg's office stamp is "Received September 1, 1948."

The Witness: That is right.

The Referee: Does that refresh your recollection as to about when you sent the letter?

The Witness: If it is—that is when, because it must have been sent possibly a week or two or three days before that.

The Referee: Take a look.

The Witness: The stamp says, "Received September 1, 1948," so I generally sent air mail. It

(Testimony of Jack Mau.)

might have been two or three—it takes about three days for air mail, and it might have been three days before September 1st, because I know there was Labor Day in there.

The Referee: Mr. Tobin, go ahead. [73]

Q. (By Mr. Tobin): Calling your attention to the first paragraph of that letter: "I just got in this morning from a serious operation at the hospital. I am, indeed, grateful to you for your understanding cooperation to me." What did you refer to in that letter, that sentence, "your understanding cooperation to me"?

Mr. Quittner: I object to that. Immaterial. Totally immaterial.

The Referee: What is that?

Mr. Quittner: I object to that. Immaterial, totally immaterial.

The Referee: Objection overruled. Maybe Mr. Mau has something to say about this. I would like to know what he had in mind when he wrote that.

The Witness: As I explained to the Court before, Mr. Wishnow and I had been pretty good friends. I bought this merchandise through Mr. Wishnow, through his New York concern. Every once in a while he said, "Jack, if you can't send them any money, send them a letter. They are 3500 miles away from here. Tell them you will pay them a little. Let the man hear from you that you don't mean to stall him off."

So, possibly, through my connection—exactly as

(Testimony of Jack Mau.)

I say—the picture started to form from July, and this escrow didn't go through, and he had found it out. I had gotten very sick, which I can bring a certificate to court to show. [74] I had lost a lot of weight, been very sick. He says, "Write him a letter and tell him when."

I wrote him a letter at—as far as I know—right after Labor Day. I know things will pick up and be better then.

The Referee: Wait a moment. At that time, when you wrote this last letter here, the escrow had not gone through?

The Witness: Oh, it had not been gone through. That is right. This was in July——

The Referee: No. This letter was in September.

The Witness: Well, then the other letter was in July. It had been, possibly, a month and a half.

The Referee: When you wrote this letter in September, whatever the date is there, or thereabouts, had the escrow gone through or not?

The Witness: No, the escrow never went through.

Q. (By Mr. Tobin): Had it fallen through?

A. Yes, it never even materialized.

The Referee: When you wrote the second letter, why didn't you say something about the escrow hadn't gone through?

The Witness: May I say this: Honestly, I hadn't had a thought of the escrow before this defraud, the man that——

(Testimony of Jack Mau.)

The Referee: Just a minute. Can you give me any reason now, any explanation why you didn't mention the escrow in here if at that time you knew or had reason to [75] believe it hadn't gone through?

The Witness: Again, I took it for granted that Mr. Wishnow was my friend, and communicated with New York, and through our friendship, I wrote this letter, telling him that I would send them a series of checks. I have never had a check go bad——

The Referee: You don't answer my question. Can you give me an explanation of why you didn't mention the escrow in that letter? Say "No" and that ends it. If you can explain it here, explain it.

The Witness: Why I didn't mention it?

The Referee: Yes.

The Witness: I possibly didn't think that I had to mention the escrow in the letter before, taking for granted that Mr. Wishnow knew it had fallen through.

Q. (By Mr. Tobin): In the third paragraph of your letter you say, "I am going to send you a series of checks, but I am making sure that the checks are good. I haven't ever had a check go bad——"

Q. How were you going to make those checks good if the escrow had fallen through?

A. Well, I was doing business every day. It hadn't dropped down any more, and I thought if

(Testimony of Jack Mau.)

the man waited a few weeks, instead of sending a bad check back, I would put the money in the bank and then send a check and not send a check for five days, hoping it would come back, my check, [76] and then go back for another week. I never did that.

The Referee: Anything further?

Mr. Tobin: No, your Honor.

The Witness: That is the reason I explain that.

Examination

By Mr. Tenner:

Q. There are a few questions I would like to ask you, Mr. Mau. A. Yes.

Q. Do I understand from your testimony that between the time you sent your first letter to New York—I mean to New Jersey, telling them you had an escrow, and the second letter, I understand you knew the escrow was not going to go through?

A. Yes.

Q. And did I understand you that you told this to Mr. Wishnow? A. Yes.

Q. Their credit representative?

A. That is right.

Q. And he knew there was no escrow?

Mr. Tobin: No evidence here that Mr. Wishnow was their credit representative. He was their sales representative.

The Referee: Yes. That is true.

Mr. Quittner: If Mr. Wishnow was no representative—— [77]

(Testimony of Jack Mau.)

The Referee: He was an uncredited representative.

Mr. Quittner: But they relied in one breath on what Mr. Wishnow told them about the escrow, and at the same time——

The Referee: If something is said to a brakeman of a railroad, that doesn't bind the president. Go ahead.

Q. (By Mr. Tenner): What position did Mr. Wishnow have with the company, if you know?

A. He represents them—he has all the Western States as a salesman.

The Referee: What do you call that in the trade?

The Witness: A salesman. Years ago they used the word "drummer", but he is a salesman, a representative on the West Coast.

The Referee: They used to have signs on doors, "Manufacturers' Agents."

The Witness: "Manufacturers' Representative." We have them out here now, and some men out here, they have offices, and they represent their manufacturers back East, but they travel.

The Referee: But what he was was a salesman?

The Witness: I would say he was Walbrooke's representative.

Mr. Tobin: The only objection I made was to the use of the words "credit representative." The credit man was Goldberg.

The Witness: May I also inject a thing? I would say [78] this, that Mr. Wishnow said, "Don't

(Testimony of Jack Mau.)

worry about anything; if you haven't got a check, I will pay for it."

I happened to be very friendly with Mr. Wishnow, and I can understand his position, working for these people.

Mr. Tenner: I will reframe my question and leave out the words "credit representative."

Q. (By Mr. Tenner): You knew Mr. Wishnow handled the affairs of Walbrooke Clothes, Inc., in Los Angeles? A. Yes, I did.

The Referee: That is going too far. He doesn't know how many affairs they had. How do you know Wishnow handled their affairs, other than being salesman?

The Witness: He was intermediary between Walbrooke and myself, being their representative. I could talk to Wishnow and he would get me certain things under price, even. He was their representative.

The Referee: Just a representative to the extent of communicating to them what you told him?

The Witness: I know. He was also their representative to this extent: If there was a certain argument—for argument's sake—if a suit of clothes cost $22, he could make a deal for $19. He was their representative also for cutting prices a little bit if he wanted to.

Q. (By Mr. Tenner): Did anyone besides Mr. Wishnow ever represent Walbrooke in their relationships with you?

(Testimony of Jack Mau.)

A. Mr. Wishnow has been with them for the last 10 [79] years. That I know.

The Referee: Did anyone else ever ask you for this money?

The Witness: No.

Q. (By Mr. Tenner): Besides Mr. Wishnow?

A. No.

Q. At the time you knew that this escrow was not going to materialize at all did you so tell Mr. Wishnow?

A. Mr. Wishnow came in about two weeks later.

Q. And what did you tell him, to the best of your recollection?

A. "Ellis, my wife went off on a tangent again. She has cracked everything all to pieces."

He said, "Don't worry, Jack. You look like hell. You are going to collapse. Why don't you get up on your feet, because you will lose everything."

And I did lose, and I can verify it, for $43,000 in less than six months.

Q. I mean concerning the escrow that had fallen through, what did you tell Mr. Wishnow?

A. "I can't do anything."

"I tell you what you do, Jack. Write to Mr. Goldberg again that, 'I appreciate your letter. As soon as a check comes here from a client,' it means you are not ignoring his letter. Then tell him what you will do."

Q. You do remember telling him that this deal had [80] fallen through?

(Testimony of Jack Mau.)

A. On my word of honor.

Mr. Tenner: That is all.

Examination

By Mr. Tobin:

Q. Mr. Goldberg, the man you had written to, telling him there was $12,500 in escrow, why didn't you tell the man you wrote that to?

A. Even these letters were always done at the bidding of Mr. Wishnow.

Q. Did Mr. Wishnow dictate this letter that——

A. Mr. Wishnow didn't dictate the first letter.

Q. But why didn't you tell Mr. Goldberg that the escrow had fallen through?

A. I had no intention of making a false statement in my first letter any more than I did in my second. My intention on the $12,500 was $1,000 I was to get, and nothing else.

The Referee: That is your explanation why you put that in there? Is that it?

The Witness: Yes.

Mr. Tenner: I would like to make some other statement. Maybe I am going—the knowledge of the agent would be knowledge of the principal.

The Referee: Knowledge of some brakeman isn't knowledge of the corporation or of the president. You have got [81] to show that the agent who got this knowledge is authorized to represent the corporation or the principal on the particular matter. That hasn't been done.

(Testimony of Jack Mau.)

The Witness: Your Honor, please don't misunderstand me. I am not an attorney.

The Referee: You may be glad you are not.

The Witness: I have only one thing to say, and that is true. During that letter of September 1st wouldn't Mr. Goldberg know that the escrow didn't go through? Isn't that self-explanatory?

The Referee: You are asking me now.

The Witness: I don't know.

The Referee: All right. Anything further?

Mr. Tobin: That is all.

Mr. Tenner: That is all.

(Witness excused.)

The Referee: All right, now, then. Here we are. Do you wish to take Mr. Wishnow's testimony?

Mr. Quittner: Mr. Wishnow is on the road?

Mr. Mau: He is not here too often. He is up and down the road. He takes Washington, Oregon —he takes all the Western States.

The Referee: How long do you think counsel should have to communicate with him?

Mr. Mau: I wouldn't know when he would be——

The Referee: Let us do it this way—— [82]

Mr. Mau: Can I say this? This is the fall season they start out now.

The Referee: Continue this matter for two weeks until we do get Wishnow. It is up to counsel to get him.

Now, Mr. Tobin, do you have to have any time to get the originals or the copies of the replies from Mr. Goldberg, particularly that "Ellis" thing?

Mr. Tobin: I think that he is always referred to as "Mr. Wishnow."

Mr. Mau: The gentleman is Ellis Wishnow.

Mr. Tobin: His first name is Ellis?

Mr. Mau: His name is Ellis Wishnow.

The Referee: This is a memorandum. It says: "To Ellis."

Mr. Mau: His name is Ellis Wishnow. I always talk to him by his first name, but his name is Ellis Wishnow.

The Referee: Then when we get Wishnow here we can examine him about this.

Mr. Mau: That is Ellis Wishnow.

The Referee: Unless Mr. Mau is mistaken, we don't need to communicate—let them bring that out with Mr. Wishnow.

Anything else that you want done to get Mr. Wishnow?

Mr. Tobin: Well, we will just have the Trustee run through any papers—

The Referee: I am going to give each side plenty of [83] time to produce whatever they think should be done.

Mr. Tobin: I think 30 days would be enough.

The Referee: Do you want to take this deposition all over again?

Mr. Tobin: No, your Honor.

The Referee: All right. From your point of view, do you want to take it over again?

Mr. Quittner: No. I was just going to say this, so that we can conclude this matter: We will permit that one letter that he has to produce as a photostatic copy, with our other objections as to hearsay. In other words, preserving that objection. In other words, we still want to preserve that objection to that letter from Goldberg to Wishnow as hearsay. That isn't pertaining to the other objections, but for that one letter, so the Court can conclude this matter and decide it or submit it, we will let that one letter in, that one letter alone.

The Referee: In other words, you want to demand the original?

Mr. Quittner: Yes, and we will, therefore, let the matter stand as submitted.

The Referee: It all comes down to the examination of Wishnow.

Mr. Quittner: Wishnow is a traveling man. He may be gone for months. Mr. Mau wants to rehabilitate himself and get started again, and we want to get the matter over with [84] today.

Mr. Tobin: Is counsel resting?

Mr. Quittner: You have to rest first.

Mr. Tobin: I have rested.

Mr. Quittner: You have? We rest. We want to dispose of the matter, if your Honor please.

The Referee: The matter is submitted?

Mr. Quittner: Yes, sir.

The Referee: Do you want to submit it on briefs?

Mr. Tobin: I do not.

Mr. Quittner: We will submit it to the Court.

The Referee: I don't know. Maybe the Court should have this written up, so the Court can be very careful about his decision. Is there any money in this estate?

Mr. Tobin: I don't know, myself, right now.

The Referee: Well, I don't know. I will mark it submitted, and then you endeavor to find out if there is any money in the estate so we can authorize——

Mr. Quittner: How much is there in the estate?

Mr. Mau: The stock was sold for $1,100.

The Referee: It is for your protection to have it written up, Mr. Mau; otherwise, I will have to depend on my recollection in making the findings. And I may be all wrong, as Jesse James said one time in a similar matter.

In the absence of the reporter's transcript the Referee makes a summary of the evidence, or I could have each [85] one of you submit your summary, and connect it up the best I can out of the two summaries.

Mr. Tobin: If your Honor please, in connection with checking up the testimony, I find here in my file a letter of May 11th to Walbrooke Clothes, Inc., in which the second paragraph says: "We partly tried the objection to this man's discharge on May 10, 1949, but, of course, your local representative, Ellis Wishnow, could not testify to his own knowledge as to the effect of Mau's letter, in so far as forebearing to press the claim against him was concerned. The matter was therefore adjourned for a

period of approximately six weeks for the purpose of taking your deposition on the written interrogatories and cross interrogatories submitted by the attorney for the bankrupt."

So, it was partly tried on May 10th. That was the date Mau testified to here.

The Referee: The question is whether we should have the testimony that has been taken written up or should the Court do the best he can after receiving each side's version of the testimony, unless Mr. Mau wants to go to that expense.

Mr. Quittner: We don't have the money.

The Referee: Then you will have to depend on my recollection, which may be faulty, but I will give both of you a chance. I think what I had better do now is this: Supposing you give me your own version of what the evidence should be, submit it to the other side, and give them time [86] to check it and to submit theirs, and I will wrestle with it and do the best I can with it.

Mr. Tobin: Very well.

Mr. Tenner: Fine. Would your Honor set some kind of time limit, 10 days, 20 days?

The Referee: 10, 10, and 5.

Mr. Tobin: I don't know. I am going to trial in Judge Harrison's court Monday. I don't know how long it will take.

The Referee: Do you want to make it 15, 10 and 5?

Mr. Tenner: Something like that.

Mr. Tobin: Yes, your Honor.

Mr. Tenner: All right.

Mr. Tobin: I would like as much as 15 days, at least.

Mr. Tenner: That is plenty of time. Thank you, your Honor.

[Endorsed]: Filed Dec. 5, 1949 [87]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain the original Debtor's Petition in Bankruptcy; Orders of Adjudication and of General Reference; Amended Specifications of Objection to Discharge of Bankrupt; Order Denying Discharge of Bankrupt; Petition for Review of Referee's Order by Judge; Trustee's Exhibit No. 1; Certificate of Referee on Review of Order Denying the Bankrupt a Discharge; Order Affirming Referee's Order; Notice of Appeal; Corrected Notice of Appeal; Statement of Points on Which Appellant Intends to Rely; and Designation of Record on Appeal and a full, true and correct copy of Minute Order Entered February 15, 1950, which, together with Reporter's Transcripts of Proceedings on May 10, 1949, and September 9, 1949, transmitted herewith, constitute the record

on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 11th day of May, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12546. United States Court of Appeals for the Ninth Circuit. Jack Mau, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Jack Mau, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed May 12, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

JACK MAU,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Jack Mau, Bankrupt,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court; to Paul W. Sampsell, Trustee in Bankruptcy Herein; and to Craig, Weller & Laugharn, His Attorneys:

I.

Comes now the Appellant herein and formally adopts as his Statement of Points on Which Appellant Intends to Rely, the said Statement of Points on Which Appellant Intends to Rely heretofore filed in the Ditrict Court of the United States, Southern District of California, Central Division, in Bankruptcy No. 46,674-PH.

II.

Appellant hereby designates as those portions of the record and proceedings to be included in the record on appeal, the following:

1. Voluntary Petition (omitting schedules) filed by the bankrupt herein Novemeber 15, 1948;

2. Order of Reference signed by the Hon. Paul J. McCormick November 15, 1948; and Order of Adjudication filed November 15, 1948;

3. Amended specifications of objections to Discharge of the Bankrupt, filed July 8, 1949;

4. Findings of Fact & Conclusions of Law on opposition to Discharge, filed November 4, 1949;

5. Order Denying Discharge of bankrupt, filed November 8, 1949;

6. Petition for Review of Referee's Order, filed November 17, 1949;

7. Referee's Certificate on Review, filed January 6, 1950;

8. Minute Order Affirming Referee, filed February 15, 1950;

9. Order affirming Referee's Order, filed March 2, 1950, and entered in Judgment Book 64, Page 713, on March 28, 1950;

10. Notice of Appeal, filed March 13, 1950;

11. Corrected Notice of Appeal, filed April 3, 1950;

12. Exhibit I introduced into evidence by the Trustee;

13. Reporter's Transcript of Proceedings at hearings on Objections to Bankrupt's Discharge on May 10, 1949, and September 9, 1949, heretofore filed with the District Court of the United States,

Southern District of California, Central Division, in Bankruptcy No. 46,674-PH.

14. Clerk's Certificate.

Dated: May 12, 1950.

QUITTNER, STUTMAN & SHUTAN,

By /s/ FRANCIS F. QUITTNER,
Attorneys for Appellant.

[Endorsed]: Filed May 15, 1950.